(23,077)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 203.

ANDRIEUS A. JONES, RECEIVER, APPELLANT,

vs.

ST. LOUIS LAND AND CATTLE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered, that heretofore, on to-wit, on the 3rd day of July, A. D., 1909, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein pending entitled George W. Stoneroad, et als., appellants, vs. William P. Beck, et als., appellees, and Numbered 1288, portions of which said transcript of record were and are as follows to-wit:

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1909.

No. —.

GEORGE W. STONEROAD et als., Appellants,
vs.
WILLIAM P. BECK et als., Appellees.

Appeal from District Court, San Miguel County.

In the Matter of the Intervention of the St. Louis Land and Cattle Company.

Transcript of Record.

TERRITORY OF NEW MEXICO,
Fourth Judicial District, County of San Miguel:

Be it remembered, that heretofore towit, on the 21st day of January, 1876, George W. Stoneroad, et als., plaintiffs, by their Solicitor, Thomas B. Catron, Esq., filed in the office of the clerk of the District Court of the First (now Fourth) Judicial District, of the Territory of New Mexico, sitting within and for the county of San Miguel, their bill of complaint, which said bill of complaint is in words and figures following, to-wit:

3 *Bill of Complaint.*

TERRITORY OF NEW MEXICO,
County of San Miguel:

In the District Court of the First Judicial District, Sitting in the County of San Miguel, Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory at the March Term, A. D. 1876.

To the Hon. Henry L. Waldo, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District Court thereof, in Chancery sitting:

George W. Stoneroad, resident of the county of San Miguel, in the Territory of New Mexico, and Irad Cochran, resident of the

State of California, and Napoleon B. Stoneroad, resident of the State of California, and A. C. Henry, resident of the State of California, and William L. Dickinson, resident of the State of California, bring this bill of complaint against William P. Beck, Anna D. Beck, Elizabeth B. Thomas and Joseph L. Thomas, her husband, residents of the county of LaFayette and State of Missouri, and Elizabeth Applegate and Eli D. Applegate, her husband, residents of the county of Jackson, State of Indiana, and Mary Ann Cronk and Rolla Cronk, her husband, residents of the county of Washington and state of Indiana, Elizabeth Corcoran and — Corcoran, her husband, whose first name is to your orators unknown, and Clement Lee, a resident of the State of California, and David L. Silver, a resident of the State of Missouri, and James Preston Beck, a resident of the county of Arapahoe and Territory of Colorado, and Julia Boaddus, resident of the State of Missouri and Vincent D. Markham, resident of the Territory of Colorado, and others, the unknown owners of the premises hereinafter described, and unknown heirs of said Preston Beck, Jr.

And therefore your orators complain and show unto Your Honor that on the 23rd day of December A. D. 1823, Bartolome
4 Baca, the then Political Chief of New Mexico, granted to Juan Estevan Pino, a certain tract of land, lying and being situate in the county of San Miguel, in the Territory of New Mexico, and known as the "Hacienda de San Juan Bautista del ojito del Rio de las Gallinas," being bounded and described as follows, towit:

On the North by the lands or sitio of Antonio Ortiz, now deceased, and the Mesa of the Aguage de la Yegua; on the East by the Mesa of Pajarito; on the South by the Pecos River, and on the West by the Point of the Mesa of Chupines, a copy of the petition, reference thereof, action of the Department Assembly thereon, are her-with filed, marked "A," and made a part of this bill of complaint.

That said, Juan Estevan Pino, departed this life, sometime during the years 1838 or 1839, leaving as his sole heirs and owners of said land, his two sons, Justo P. Pino and Manuel D. Pino.

That on the 13th day of October A. D. 1884, said Justo D. Pino and Gertrudie Rascon, his wife, sold, transferred and conveyed by deed of conveyance, duly executed, all their right, title and interest in and to said tract of land to Preston Beck, Jr., deceased, and on the 18th day of June, A. D. 1853, said Manuel D. Pino and Josefa Ortiz, his wife, transferred and conveyed, by deed of conveyance, to Hugh N. Smith, as trustee, in trust for said Preston Beck, Jr., the undivided one-half interest owned by them by inheritance as aforesaid, in and to said tract of land, and thereafter the said Hugh N. Smith, as said trustee, towit, on the 12th day of December A. D. 1854, by deed of conveyance, in due form of law sold and conveyed the said undivided one-half interest to said Preston Beck, Jr., copies of which said deeds and conveyances are her-with filed, marked respectively "B," "C" and "D," and made a part of this bill of complaint.

That the said Preston Beck, Jr., being the owner of the said tract of land, by virtue of the conveyances to him as aforesaid, in due

form of law, on the 13th day of December, A. D. 1856, the same was approved by the Surveyor General of the Territory of New Mexico and recommended by him for confirmation by the Congress of the United States, and the said Grant of the said tract
5 of land was confirmed by Congress to said Preston Beck, Jr., and his legal representative by an Act thereof, approved June 21st, 1860. After the confirmation of said grant, towit: during the year 1860, the said tract of land was surveyed under the direction of the said Surveyor General, by Pelham and Clements, Deputy Surveyors of the United States, a copy of the plat and approval of said survey is herewith filed, marked "E," and made a part of this bill of complaint.

That on the 30th day of December, A. D. 1856, the said Preston Beck, Jr., sold, transferred and conveyed the undivided one-third interest in and to said tract of land to Hugh N. Smith above mentioned, a copy of said deed of conveyance is herewith filed, marked "F," and made a part of this bill of complaint.

That the said Preston Beck, Jr., departed this life on or about the 13th day of April, A. D. 1858, leaving his last will and testament, in which he left his universal and sole heirs and legatees the following persons towit: the defendants, James P. Beck, William P. Beck, Anna D. Beck, Elizabeth B. Thomas, then Elizabeth Beck, Elizabeth Applegate, (then Elizabeth Cracroft,) Mary Ann Cronk, (then Mary Ann Cracroft,) and Elizabeth C. Silver, (then Elizabeth C. Beck,) deceased, (wife of the said David H. Silver,) who departed this life leaving one child named Isabella Silver, who survived her Mother only about four years, leaving said David H. Silver, the sole heir to her and her mother's property, the said Elizabeth C. Silver, née Beck, having departed this life after the decease of said Preston Beck, Jr., and sometime in the year 1858; Preston H. Lea, since deceased, who left as his sole heirs, his wife Elizabeth, since intermarried with said defendant —— Corcoran, and said defendant Clement Lea, his son, and said John Joefry Beck, since deceased, who left by his last will and testament Ellen Lee Shoemaker, as his sole and only heir, said Ellen Lee Shoemaker, now Ellen Lee Smith, who afterwards intermarried with one Joseph F. Smith.

That the said Ellen Lee Smith and her said husband, as your orators are informed and believe, have sold and transferred and conveyed all of their said interest in the said lands to the said
6 Joseph L. Thomas, and that the said James Preston Beck, as your orators are informed and believe, has sold, transferred and conveyed, some portion of the said lands to the said Julia Broadus and Vincent D. Markham. That the said defendants by virtue of the inheritances and conveyances aforesaid are the owners of the undivided two-third- interest in the said tract of land, as your orators are informed and believe.

That the said Hugh N. Smith departed this life on or about the 13th day of December A. D. 1859, leaving as his heirs his Father, Robert N. Smith, and his Mother, Mary M. Smith, since which time by divers and sundry mesne conveyances the said one-third

interest has been transferred and conveyed to and is now the property of and owned by your orators in an undivided state.

Your orators further show that they have frequently applied unto and requested the said defendants to join and concur with them in making a fair, just and equitable partition of the said premises between them, so that your orators might hold and possess their one-third separate and apart from any common interest with the said defendants, and that the said defendants might hold and possess the remaining two-thirds thereof separate and apart from the remainder of your orators in fee simple, and that the said one-third and the said two thirds may be allotted and held in severalty by the aforesaid owners thereof. And your orators well hoped that the said defendants would have complied with such their reasonable request, as in justice and equity they ought to have done. But, now, so it is, May it Please your Honor, a portion of the said defendants to-wit: the said James Preston Beck, absolutely refuses to comply with such your orators' reasonable request as aforesaid, pretending that your orators have no interest in said tract of land and no right to the partition thereof.

Whereas, your orators charge, and so the truth is, that a fair and just and equal partition of the said land and premises will tend greatly to the benefit and advantage of your orators and the said defendants; but they, the said defendants, under divers
7 frivolous pretenses absolutely refuse to join or concur with your orators therein.

All of which actings, doings, *prenteses* and refusals, are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators in the premises.

In Consideration Whereof, and forasmuch as your orators can have adequate remedy in the premises in a court of equity where matters of this nature are properly cognizable and relievable;

To the end therefore that the said defendants may full, true and direct and perfect answers make, (an answer under oath being hereby expressly waived), to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers to all and singular the matters aforesaid, and that a commission of partition may be issued out of and under the seal of this Honorable Court directed to certain commissioners therein named, to divide and allot the said lands, hereditaments and premises into parts or shares, and that one full and equal third thereof, may be allot-ed and conveyed unto your orators, and that the remainder thereof may be allotted and conveyed in equal parts thereof to the several defendants according to their respective interests, and that your orators and the said defendants may severally hold and enjoy their respective allotments of the said hereditaments and premises according to the nature thereof in severalty, and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect; and in case it should appear that the said premises are so circumstanced that a partition cannot be made thereof, your orators pray the same

may be sold and the proceeds thereof distributed in proportion to the respective interests of all the said parties.

May it please Your Honor to grant unto your orators, a writ of subpœna, to be directed to William P. Beck, Anna D. Beck, Elizabeth B. Thomas, Joseph L. Thomas, Elizabeth Applegate, Eli D. Applegate, Mary Ann Cronk, Rolla Cronk, Elizabeth Corcoran, Frank E. Corcoran, Clement Lea, David H. Silver, James Preston Beck, Julia Broaddus, and Vincent D. Markham, and others,
8 the unknown owners in the premises, and unknown heirs of said Preston Beck, Jr., thereby commanding them at a certain day and under a certain pain therein to be limited personally to be and appear before your Honor's court at the next March term thereof, A. D. 1876 on the first day of said term, then and there full, true and perfect answers make to all and singular the premises and further to stand to, perform and abide such further order and direction and decree therein as to your Honor may seem meet, and that your Honor will grant unto your orators such other and further relief in the premises as the nature of the case requires, and to your honor may seem meet and proper, and your orators will ever pray, etc.

T. B. CATRON,
Solicitor for Complainants.

(Endorsed:) No. 609, District Court, County of San Miguel, George W. Stoneroad, et als., vs. William P. Beck, et als In Chancery. $5.00 paid by Mr. Catron. "Bill." Filed in my office this 21st day of January, 1876. R. J. Palen, Register. T. B. Catron, Sol. for Complts.

And afterwards, towit, on the 9th day of March 1876, there was filed in said clerk's office a Proof of Publication, words and figures as follows, towit:

In the District Court of the Territory of New Mexico, in and for the County of San Miguel, March Term, 1876.

GEORGE W. STONEROAD et als.
versus
WILLIAM P. BECK et als.

Affidavit of Publication.

9 *Legal Notice.*

In the District Court, County of San Miguel.

GEORGE W. STONEROAD et als.
versus
WILLIAM P. BECK et als.

The said defendants, William P. Beck, Anna D. Beck, Elizabeth B. Thomas, Joseph L. Thomas, Elizabeth Applegate, Eli D. Apple-

gate, Mary Ann Cronk, Rolla Cronk, Elizabeth Corcoran, and — Corcoran, her husband, David H. Silver, James Preston Beck, Julia Broaddus and Vincent D. Markham, and others, the unknown owners in the premises hereinafter referred to, and the unknown heirs of Preston Beck, Jr., deceased, are hereby notified that a suit in chancery has been commenced against them in the District court for the county of San Miguel, Territory of New Mexico, by said plaintiffs, George W. Stoneroad, Irad Cochran, Napoleon B. Stoneroad, A. C. Henry and William L. Dickenson, praying for the partition of the following described premises, towit: The tract of land situate in the said county of San Miguel, bounded on the north by lands formerly of Antonio Ortiz, now deceased, and the "mesa" of the "Aguage de la Yegua," on the east by the Mesa of Pajarito; on the South by the Pecos river, and on the West by the Mesa of Chupainas; also praying that in case a partition could not be made, that the same might be sold and the proceeds thereof distributed in proportion to the respective interests; also praying for general relief.

That unless you enter your appearance in said suit on or before the first day of the next term of said court commencing on the 8th day of March, 1876, decree pro confesso will be entered against you therein. January 20th 1876.

T. B. CATRON,
Solicitor for Complainants.

R. J. PALEN, *Clerk.*

I, J. H. Koogler, being duly sworn, depose and say: that I am Publisher of the Las Vegas Gazette, a weekly newspaper published at Las Vegas, San Miguel County, New Mexico: that the annexed "Legal Notice," was published in the weekly Las Vegas Gazette for four consecutive weeks commencing on the 22nd day of January and terminating on the 12th day of February 1876 on the following regular days of publication: January 22nd and 29th, February 5th and 12th, 1876.

J. H. KOOGLER.

Subscribed and sworn to by the said J. H. Koogler, this 9th day of March 1876.

R. J. PALEN, *Register.*

(Endorsed:) No. 609, Stoneroad, et als, vs. Beck, et als. Proof of Publication. Filed in my office this 9th day of March, 1876. R. J. Palen, Clerk. Fee of Publication, $20.00.

And afterwards, towit, on March 4th, 1903, there was filed in said clerk's office for the district court of San Miguel county, Territory of New Mexico, an order of court appointing A. A. Jones, Receiver, which said order is in words and figures as follows, towit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et als.
vs.
WILLIAM P. BECK et als.

This cause coming on this day to be heard upon the petition of Robert L. Brown, Thomas Carson, The Scottish Mortgage and Investment Company of New Mexico (Limited), Luella J. Dickenson, Anna M. Henry, Gilbert L. Curtiss, and Lillian Grace Curtiss, his wife, and Andrieus A. Jones, for the appointment of a receiver for all of the land described in the bill of complaint in this cause, with exception of that part of the segregated one-third of said grant which does not over-lap or conflict with the Anton Chico
11 Grant; and it appearing to the court that due and timely notice of this application has been given to all parties of record in said cause; and the court being fully advised in the premises:

It is ordered, adjudged and decreed by the court, that Andrieus A. Jones, be and he is hereby appointed Receiver of all those certain lands and real estate, situate, lying and being partly in the county of San Miguel, and partly in the county of Guadalupe, in the Territory of New Mexico, and described as follows, towit:

"Hacienda of San Juan Bautista del Ojito del Rio de los Gallinas," granted by Bartolome Baca, Governor of the Province of New Mexico, to Don Estevan Pino, in the year 1823, and bounded on the North by the land marks of the farm of Don Antonio Ortiz and the table lands of the Aguaje de la Yegua; on the south by the Pecos River; on the East by the table land of the Pajarito and on the West by the point of the table lands of the Chupaines; which said Grant of land was confirmed to Preston Beck, Jr., by Act of the Congress of the United States of America, on the 21st day of June, A. D. 1860.

Except that portion of said grant, which was segregated in pursuance of an order entered in the above entitled case, dated April 23rd, A. D. 1891, which lies to the East of and does not over-lap and is not in conflict with that certain other tract of land more particularly described in the pleadings in this case and known as the Anton Chico Grant.

It is further ordered, adjudged and decreed by the court that all persons who may be in possession of any part or portion of the above described land and real estate, except such parts as are held by vested title in severalty, of which the said Andrieus A. Jones, is hereby appointed Receiver, be and they are hereby ordered and directed to surrender said possession upto the said Receiver forthwith, and that failing so to do they will be considered in contempt of this court.

It is further ordered, adjudged and decreed by the court, that said receiver be and he hereby is ordered and directed to lease and let such part or parts of said land and real estate from time to time as the said Receiver may deem for the best interests of the proprietors of said land and real estate, and upon such terms
12 and conditions as the said Receiver may deem right and just, and in order to facilitate the leasing and letting of said land and real estate, the said Receiver be and he is hereby authorized and directed to make such improvements and construct such fences as may be necessary for the convenient use and occupation of said lands and premises by such lessees, and that the costs of such improvements and fences be paid out of the proceeds from the leasing of said land and real estate.

Done in Chambers at Las Vegas, N. M., this 28th day of February A. D. 1903.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 609. District Court San Miguel County. George W. Stoneroad, et als., vs. William P. Beck, et als. Order of court appointing Andrieus A. Jones, Receiver, etc. Filed in my office March 4, 1903. Secundino Romero, Clerk. Rec. R. L. page 504.

And afterwards, towit, on August 24th 1903, there was filed in said clerk's office the intervening petition of the St. Louis Land & Cattle Company, in words and figures as follows, towit:

13 TERRITORY OF NEW MEXICO.

In the District Court, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et als.
vs.
WILLIAM P. BECK et als.

Intervening Petition.

Your petitioner, The St. Louis Land and Cattle Company, respectfully represents to the Court that it is the owner of the Perea Grant, as described upon the land office map of the Territory of New Mexico, and the records of the surveyor general's office relating to said Grant No. 16, according to the records of the Surveyor General's office, reference to which is hereby expressly made for a further description of the same.

Petitioner further represents that it is informed and believes the said A. A. Jones, acting as such Receiver, and pretending to and that the said suit was brought for the purpose of a partition and settling of title of the Beck Grant, and that it is alleged that

there is a conflict between the said Beck Grant and the said Peres Grant, but petitioner represents and alleges that the title to the said land in conflict between the said Grants, belongs to the said petitioner and is a better title.

Petitioner further represents that it is informed and believes that the said A. A. Jones, acting as such Receiver, and presenting to have authority under the order of said court as aforesaid, has forcibly entered and intruded upon the said land in conflict between the said Grants, and broken into a house which your petitioner owns, on said land, by force and arms, and unlawfully ejected your petitioner's tenants and servants from the possession of the said house and the said land.

14 Wherefore your petitioner prays that the said Receiver be ordered to surrender the possession of the said premises so unlawfully and forcibly taken by him to your petitioner, and that if he asserts any rights in and to the said premises, that he be instructed by the court to bring such suit as the court may deem proper in the premises for the possession of the same. And thus your petitioner will ever pray.

W. B. CHILDERS,
Attorney for Petitioner.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

George W. Harrison, of lawful age, being duly sworn on oath deposes and says, that he is President of the St. Louis Land and Cattle Company, a corporation, the petitioner above mentioned; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true to the best of his knowledge and belief.

GEORGE W. HARRISON.

Subscribed in my presence and sworn to before me this tenth day of July A. D. 1903.

[SEAL.]

E. L. MEDLER,
Notary Public.

15 And afterwards, towit, on the 23rd day of October 1903, there was filed in said clerk's office a petition of the Receiver, A. A. Jones, in words and figures as follows, towit:

In the District Court, Fourth Judicial District, County of San Miguel, Territory of New Mexico.

No. 609.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK et als., Defendants.

To the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico and Judge of said District Court:

Now comes Andrieus A. Jones, as Receiver in the above entitled cause, and represents to the court, that heretofore towit, on the 28th day of February A. D. 1903, by an order of the court, en-
16 tered in the above entitled cause, he was appointed Receiver of all those certain lands and real estate, situate, lying and being partly in the county of San Miguel and partly in the county of Guadalupe, in the Territory of New Mexico, and described as follows, towit:

"Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas", granted by Bartolome Baca, Governor of the Province of New Mexico, to Don Juan Estevan Pino, in the year 1823, and bounded on the north by the land-marks of the farm of Don Antonio Ortiz and the table lands of the Aguaje de la Yegua; on the south by the Pecos river; on the east by the table lands of the Pajarito, and on the west by the point of the table lands of the Chupames, and which said grant of land was confirmed to Preston Beck, Jr., by Act of the Congress of the United States of America, on the 21st day of June A. D. 1860, except that portion of said grant which was segregated in pursuance of an order entered in the above entitled cause, dated April 23rd, A. D. 1891, which lies to the east and does not overlap and is not in conflict with that certain other tract of land more particularly described in the pleadings in this cause, and known as the Anton Chico Grant. All of which will appear by the order of the court in said cause, reference to which is hereby made, and the same is hereby made a part hereof.

Said Receiver further states that he is familiar with the boundaries of the Preston Beck Grant as described in said order of the court, appointing him as such receiver, and also familiar with the boundaries of said Grant as surveyed by the Government of the United States, and also familiar with the boundaries of the so-called Perea Grant, and particularly that part of said Grants which it is claimed over-laps or conflicts.

That on or about the 20th day of June, A. D. 1903, he, in company with one Hale I. Lutz, went upon said property for the purpose of designating the boundaries of the tract of land which the said Receiver intended to lease to the said Hale I. Lutz.

Said Receiver further represents that at a point just north of the Pecos river, and about two or three hundred yards east of the place

where the Esteros Creek empties into the Pecos River, from
17 the North, he and the said Hale I. Lutz, found a three room house built of stone, having a dirt room, and which was in bad repair; at the time of this visit of said receiver and the said Lutz, said house was unoccupied. And on said date the said receiver agreed to and did lease to the said Hale I. Lutz, a tract of land within the boundaries of the Preston Beck Grant, containing twenty five or twenty six thousand acres of land, which included all that portion of the so-called overlap of the said grants which lies East of a point two or three hundred yards from the Mouth of said Esteros Creek, and which includes the said house.

Said Receiver further represents that at said time all of the land so leased to the said Lutz was unoccupied except so far as the same was occupied by the said Receiver who was then upon the said land for the purpose of occupying and possessing the same, and designating boundaries as aforesaid, for the purpose of leasing the same in accordance with the order of the court appointing him as such Receiver.

Said Receiver further represents that on the 23rd day of June A. D. 1903, he executed a lease to the said Hale I. Lutz; that by the terms of said lease it was provided that if for any reason the said Hale I. Lutz, should not be able to have and retain exclusive possession of that part of said tract of land claimed to be a part and portion of the Perea Grant, then and in such event the rental of the land agreed to be paid by the said Lutz for the same should cease and determine from the time that said Lutz should be excluded from said land. It was also provided by said lease that the said Hale Lutz should fence said land and that the cost of such fencing should be considered as advance payments for rent.

Said Receiver further represents that having previously to his said entry upon said land, ascertained that the said overlap or conflict was unoccupied, he arranged for one O. G. Handy and Thomas W. Stoneroad, to go upon said land and take possession of the same for him as such receiver. That afterwards, towit, on or about the 28th day of June, A. D. 1903, he again went upon said
land and found that his said agents and representatives,
18 Handy and Stoneroad, were upon said land, and occupying said house and grazing their live stock upon the so-called overlap, as well as other lands in that vicinity.

Said Receiver further represents, upon information and belief that his agents continued to occupy said house and said premises, until on or about the 5th day of July, 1903, when possession of said house was surrendered to Hale I. Lutz, the lessee of said Receiver. That, thereafter, on or about the 1st day of July, A. D. 1903, said Lutz returned to said property for the purpose of possessing and occupying said land which he had leased aforesaid, and found said house occupied by O. G. Handy and Thomas W. Stoneroad, as agents of said receiver. That on or about the 5th day of July 1903, said house was occupied by the employés of said Lutz, and was so occupied until on or about the 2nd day of September 1903; that on or about the 8th day of July 1903, said Lutz began fencing said

tract so leased by him and completely enclosed that portion of said so-called over-lap, which lies west of what is known as the Fort Sumner road, which said road lies a short distance North of said house and extends in a southeasterly direction across said over-lap; that said Lutz on or about the 27th day of July, 1903, occupied that portion of said over-lap lying west of said road, by placing thereon about six hundred head of cattle. That afterwards he proceeded to enclose with a fence the remainder of the tract of land leased by him as aforesaid, and including that portion of said over-lap which lies to the east of said road, and completed said enclosure on or about the 26th day of August 1903, and thereafter occupied the said land within said last mentioned enclosure, with his cattle and live stock, and resides upon the same with his family and has continued to occupy the same up to the present time and now occupies the same. That the employés of said Hale I. Lutz moved out of said house on or about the 2nd day of September 1903, and that the doors and windows of said house were fastened by said Lutz; that said Lutz continued to look after said house, and the said land enclosed by his fence, from time to time, as occasion required. That afterwards, on or about the 17th day of September, 1903, one Jose Albino Sena, in some manner entered the said house and now occupies the
19 the same. That on the 18th day of September 1903, said Sena, went to the said Lutz and notified Lutz that he, the said Sena, had taken possession of said house, under the instructions of one George W. Harrison, who, your receiver is informed and believes, is representing the St. Louis Land and Cattle Company, a corporation, which has intervened in the above entitled cause. And said Sena stated to said Lutz that by the authority aforesaid he was instructed to notify said Lutz to the effect that said Lutz should not further graze any animals upon said so-called over-lap, and that the parties whom the said Sena represented, intended to graze stock upon said over-lap, and to that end were arranging to bring stone upon the same. That said Sena, pretending to act under the instructions of said George W. Harrison aforesaid, about Oct. 1, 1903, commenced having post-holes dug and fence posts distributed within the land enclosed by the said Lutz on said over-lap, for the purpose, as the said Sena stated, to said Lutz, of enclosing said over-lap with a wire fence; that on October 2nd, 1903, said Lutz notified said Sena that he was trespassing upon said Lutz's rights. and ordered him to discontinue constructing said fence; but that on October 5th, said Sena, disregarding the instructions of said Lutz, continued the construction of said fence, and men working under said Sena, were then distributing posts within the said pasture so enclosed by the said Lutz as aforesaid.

Said Receiver further represents that the actions of the said George W. Harrison interfere materially with the possession of said Receiver, and harass and annoys the said tenant of said Receiver and unless said annoyance is prevented and the tenant of said Receiver permitted to occupy said land and real estate, unmolested, the said Receiver will be deprived of the rentals which he otherwise would receive for the same under the terms and provisions of said lease,

and would be deprived of the fencing put upon said land under the instructions from said Receiver, and would incur the expense of the construction of said fences and receive no returns for the same.

Said Receiver further represents that on or about the — day of July A. D. 1903, while the so-called over-lap or tract of
20 land was occupied and in the actual possession of the said Hale I. Lutz, as tenant of said Receiver, the St. Louis Land & Cattle Company, filed an intervening petition in the above entitled cause, admitting that the said house and tract of land constituting such over-lap of the said grants was in possession of said Receiver. Attached to said petition of the Cattle Company was an affidavit by said George W. Harrison, in which it was stated that he was President of the St. Louis Land and Cattle Company.

Said Receiver further represents, upon information and belief, that the said George W. Harrison, as president of the St. Louis Land and Cattle Company, authorized and directed the interference with the possession of said Receiver of said house and over-lap and the tenant of said Receiver, in the manner hereinbefore set forth, and while the said Harrison had full and complete knowledge of the fact that said land and real estate including said house and over-lap was in the actual possession of said receiver, appointed as aforesaid, and the tenant of said receiver.

Wherefore, said Andrieus A. Jones, as receiver, as aforesaid presents to the court the above and foregoing facts, and prays that the court may issue an order directed to the said George W. Harrison, requiring him, upon a certain date, to be fixed by said court, to be and appear before the said court, and then and there show cause, if any he has, why he, the said George W. Harrison, should not be attached and punished for contempt of court in interfering with the possession of said land and real estate by the said receiver appointed by said court as aforesaid; and that the court may grant such other and further order in the premises as to the same shall seem meet.

ANDRIEUS A. JONES, *Receiver.*

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

Andrieus A. Jones, being first duly sworn according to law deposes and says: that he has read the foregoing petition subscribed
21 by him and knows the contents thereof, and that the facts therein stated are true upon his own knowledge, except the matters and things therein stated upon information and belief, and as to such matters and things he believes them to be true.

ANDRIEUS A. JONES.

Subscribed and sworn to before me this 22nd day of October, 1903.

[SEAL.] W. H. UNGLES,
Notary Public.

(Endorsed:) No. 609. District Court, San Miguel county. Geo. W. Stoneroad et al. vs. William P. Beck et al. Petition of Receiver. Filed in my office this 23rd day of October 1903. Secundino Romero, Clerk.

22 And afterwards, towit, on October 23rd 1903, there was filed in said clerk's office, an order of the court, in words and figures as follows, towit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et als.
vs.
WILLIAM P. BECK et als.

This cause coming on to be heard upon the petition of Andrieus A. Jones, heretofore appointed receiver in said cause, and the affidavits accompanying the same, whereby it is made to appear to the court that said Receiver obtained the actual and constructive possession of that part and portion of the land and real estate described in this cause, known as the Preston Beck Grant, which over-laps or conflicts with that certain portion of the alleged Perea Grant, which lies to the east and south of a point about two hundred yards east of the mouth of the Esteros Creek. And it further appearing to the court that while the said Receiver was so in possession of said land and real estate, that one George W. Harrison, by divers means and in divers ways interfered with the possession of said land by the said Receiver, after having obtained full knowledge of the appointment of said receiver and the possession of said land by said
23 receiver, in that the said Harrison has caused the house upon said property to be occupied, and caused post-holes to be dug in and fence posts to be distributed upon said land, and threatens to fence and occupy a portion of said land without the direction of this court and without the au-hority of law.

It is Ordered: That the said George W. Harrison, be notified by the service upon him of an attested copy of this order, to be and appear before the said court, at the chambers of the chief justice of the supreme court of the territory of New Mexico, and judge of said court, in Las Vegas, on the 10th day of November, 1903, at the hour of ten o'clock A. M., of said day, then and there to show cause, if any he has, why an attachment should not issue against him, the said George W. Harrison, as and for the contempt of this court.

Dated at Las Vegas, N. M., this 23rd day of October, A. D. 1903.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 609. District court, San Miguel county. George W. Stoneroad et al. vs. William P. Beck et al. Order of Court. Filed in my office this 23rd day of October 1903. Secundino Romero, Clerk. Rec. L. Page 626.

24 And afterwards, towit, there was filed in said clerk's office, Nov. 10th 1903, the answer of George W. Harrison, to the rule to show cause, with affidavit of Juliano Castillo accompanying same, in words and figures as follows, towit:

In the District Court of the Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of San Miguel.

No. 609.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK et als., Defendants.

25 *Answer of George W. Harrison to the Rule to Show Cause.*

The order of the court entered in the above entitled cause why he should not be punished for contempt of court, having been served upon him, now comes the said George W. Harrison, and shows to the court in answer to the said rule the following:

I.

His wife became the owner of half of what is known as the Perea Grant, deriving her title from Jose L. Perea, deceased, in the year A. D. 1887, and respondent acquired the other half in the year 1888, subsequently acquiring his wife's half also, and has been in the actual, adverse, continuous, open and notorious possession of the same ever since said date and until he conveyed the same to the St. Louis Land and Cattle Company, about the month of April A. D. 1903; and that he is the principal stockholder, director and president of the said St. Louis Land and Cattle Company, a corporation, incorporated under the laws of the Territory of New Mexico; and that the said corporation after the said conveyance of said grant to it by this respondent as aforesaid, remained in the actual, adverse, continuous, open and notorious possession of the said grant and the whole of the same, including that part thereof which over-laps the so-called Beck grant, hereinafter referred to, until the said possession of the said St. Louis Land and Cattle Company, was wrongfully entered upon by the Receiver in this cause, his agents, employees and lessees as hereinafter alleged. For a full description of said Perea Grant reference is hereby made to the survey of the same made by the Surveyor-General of the Territory of New Mexico and on file in his office, said Grant having been surveyed and patented by the United States to the said Jose L. Perea as a private Land Claim No. 16.

II.

Respondent alleges upon information and belief that the said Jose L. Perea in his life time, and his heirs after his death
26 were and had been in the actual continuous open, notorious, adverse possession of the said Perea Grant, for more than

twenty years next preceding the conveyance of the said grant to this respondent as aforesaid, in the year A. D. 1888.

III.

Respondent further alleges, upon information and belief that the above entitled suit in which A. A. Jones was appointed receiver of the so-called Beck Grant, was brought in about the year 1876—that neither the said Jose L. Perea, who was one of the most prominent and widely known citizens and residents of the Territory of New Mexico, and who was the patentee of the said Perea Grant as aforesaid and whose title thereto was of record, and who died in the year 1883, nor any of his heirs or successors in title ever was a party to the said suit, nor was any process constructive or otherwise ever served upon them or any of them, or did the said Jose L. Perea, or any of his heirs and successors in title ever enter any appearance in said suit, except so far as the filing of the petition in this cause by the said St. Louis Land and Cattle Company, reference to which is hereby expressly made and the same made a part hereof, if this answer was the entry of such appearance.

Further answering, respondent alleges that he is advised by counsel that the filing of said petition was for a special purpose, and did not make either this respondent, or the said petitioner a party to the said suit, except for the purpose of praying for the relief asked for in the said petition.

IV.

Respondent further alleges that the said A. A. Jones was appointed Receiver in this cause, before said petition was filed on behalf of the said St. Louis Land and Cattle Company, and without any notice whatever having been previously served upon the said corporation or this respondent, that any such application would be made for the appointment of such receiver; and when neither the said corporation nor this respondent, or their predecessors in title, as aforesaid were parties to this cause, and further alleges that no notice
27 to show cause why said receiver should not be continued or a copy of the order appointing the said receiver or any other notice, order or process relating to the appointment of the said receiver either before or after the appointment of said receiver was ever served upon the said St. Louis Land and Cattle Company, or upon this respondent.

Respondent further alleges that he first learned that said A. A. Jones was claiming to be a receiver in this cause, and claiming a right to the possession of a part of the said Perea Grant as such receiver in the month of July, 1903, when he received a letter from Jose A. Sena, informing him that the agents of the said Jones had broken into the house on said grant on or about the 28th day of June 1903, and taken forcible possession thereof as hereinafter alleged.

Respondent further alleges that he is informed by his counsel, that although he has made diligent search therefor, said counsel has been unable to find the original bill of complaint in this cause,—and

is also likewise informed and believes that from the various pleadings in said cause which his counsel has been able to find, that the only relief prayed for by the said original bill of complaint and the several intervening petition- filed in the said cause by claimants of interest in the so-called Beck Grant was for the establishment of their several interests in said alleged Grant and for a partition of the same.

Respondent further alleges that none of the original parties plaintiff or defendant and intervenors in this cause, upon the face of the pleadings in this case, or in fact, claim any rights whatever under the Perea Grant, or the patent of the United States, conveying the same as aforesaid to the said Jose L. Perea, deceased,—and that neither the said Jose L. Perea, nor any of his successors in title, nor the said St. Louis Land and Cattle Company nor this respondent claim or ever claimed any right whatsoever in and to any part of the said so-called Beck Grant, or the said Perea Grant under the original Beck Grant, or any confirmation thereof, and patent therefor from the United States,—but that the claims of said Jose L. Perea, deceased, and his successors in title to the portion of the Perea Grant as surveyed and patented by the United States which is alleged to lie within the boundaries of the said so-called
28 Beck Grant are hostile and adversary to the claimants of the said Beck Grant as hereinbefore alleged, and said portion of said Perea Grant has been as aforesaid in the continuous, exclusive and adverse possession of the said Jose L. Perea and his successors in title for more than twenty years last past, and said claimants under the said two grants claim under hostile title.

V.

Respondent alleges, as he is informed and believes, that on or about the 28th day of June A. D. 1903, one Thomas W. Stoneroad and adverse possession of the said Jose L. Perea and his successors in upon the portion of said Perea Grant alleged to be in conflict with the said alleged Beck Grant and broke into and took forcible possession of the house located on said over-lap and excluded the tenants and employees of the said Land and Cattle Company therefrom, and retained possession of the same, until this respondent resumed possession of the same, obtaining such possession peaceably and quietly on or about the — day of September A. D. 1903.

Respondent further alleges that after the forcible taking possession of the said house as aforesaid, the said Receiver proceeded to make a lease to one Hale I. Lutz, of about twenty-five or twenty-six thousand acres of land, a portion of the same being the said over-lap of the said Perea Grant, on the said pretended Beck Grant, and respondent alleges, that he is informed and believes that said receiver never in any manner called the attention of this court to the conflict between the said two grants and never obtained any authority other than the general authority conferred by his appointment as receiver, to interfere with the possession of the said St. Louis Land and Cattle Company of the land in said over-lap, or any such authority to lease the same. Respondent further alleges that the said

Lutz, after obtaining the said lease, proceeded to fence up all of said over-lap, placing said fence on the lines of the said Beck Grant as claimed, around said over-lap, and also drove off and forcibly excluded from said over-lap all the stock of the tenants and employees of the said Land and Cattle Company.

29 Respondent further alleges, that thereafter, about the 20th day of September, 1903, he ordered the employees of said Land and Cattle Company to construct a fence along the lines of the said Perea Grant, as described in the patent for the same, and to begin at the point on the map attached to the patent for said grant marked as "Initial Point" which is north and a short distance west of said house and fence, thence easterly along the northern boundary of said Grant and continue around the boundaries of said grant until it was completely enclosed,—and that as he is informed and believes said employees had completed said fence along said northern boundary almost to the north east corner of said grant, when said employees were prevented from further extending said fence in said direction by the forcible interference of the said Lutz and others pretending to act under said receiver. That thereafter, said employees commenced at said "initial point," and ran said fence in the opposite direction, outside of said over-lap and have placed a fence on almost the whole of the boundaries of said Grant outside of said over-lap. Respondent herewith exhibits said map to the court to show the said over-lap, said "initial point," and the location of said fence and said house.

Respondent submits that the appointment of said receiver so far as he and the said Land and Cattle Company are concerned, and claim interest in said Perea Grant, if intended to affect the same, is wholly null and void, and that the actings and doings of said receiver and those pretending to act under him is an abuse of the powers and process of this honorable court,—and further alleges that he acted under the advise of his counsel, in all that he did in the premises, and asks to be hence dismissed with his costs and that the said receiver be ordered to restore the possession of said land in dispute to the said Land and Cattle Company, and to desist from interfering with the possession of said company of the same, until he shall have acquired a right to do so by the determination of a court in an appropriate proceeding having jurisdiction to pass upon the rights of the parties, in and to the land in dispute, between the claimants of said two grants, and thus respondent will ever pray.

GEORGE W. HARRISON.

30 TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

George W. Harrison, being first duly sworn and having read the foregoing answer says; that the matterst and things therein alleged are true of his own knowledge except as to those matters and things alleged on information and belief and as to those matters and things he verily believes it to be true.

GEORGE W. HARRISON.

Subscribed and sworn to before me this 10th day of November . D. 1903.

STEPHEN B. DAVIS, Jr.,
Notary Public.

(Endorsed:) No. 609. District Court, San Miguel county. eorge W. Stoneroad, et al., plaintiff-, vs. William P. Beck, et al., efendant-. Answer of Geo. W. Harrison. Filed in my office this 0th day of Nov. 1903. Secundino Romero, Clerk. W. B. Chilers, Albuquerque, New Mexico, Attorney for G. W. Harrison.

And afterwards, to wit, on D-cember 10th there was filed in said lerk's office the sworn answer of the receiver A. A. Jones, to the etition of the St. Louis Land and Cattle Company, sworn to Noember 10th 1903 in words and figures as follows, towit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et al., Plaintiffs,
vs.
WILLIAM P. BECK et al., Defendants.

Now comes Andrieus A. Jones, heretofore appointed receiver in said cause and for answer to the intervening petition of the St. Louis Land & Cattle Company, says:

31 First. Upon information and belief, said receiver denies that the St. Louis Land and Cattle Company is the owner of the Perea Grant as described upon the land office map of the Territory of New Mexico, and the records of the surveyor general's office relating to said Grant, Number 16, according to the records of the surveyor General's office.

Second. Said receiver admits that he was appointed receiver in the above entitled cause and that said suit was brought for the purpose of the partitioning and settling the title of the Beck Grant, and that there is an alleged conflict between the said Beck Grant and the said Perea Grant, but said receiver, upon information and belief, represents and alleges that the title to the said land in conflict between the said grants belongs to the owners of the said Beck Grant, and that the owners of the said Beck Grant have absolute title to the same.

Third. Said receiver denies that he has forcibly entered and intruded upon said land in conflict between said grants and broken into a house which the said The St. Louis Land and Cattle Company owns on said land, by force and arms, and unlawfully ejected the said petitioner's servants and tenants from the possession of said house or said land.

Said receiver further represents that he did take possession of said over-lap and the house upon the same, but that he obtained such

possession without violence or any breach of the peace and that at the time of obtaining such possession the same was not in actual possession of the said petitioner or anyone representing said petitioner. That the said house was wholly unoccupied and that said over-lap was also unoccupied, and that the said receiver obtained possession of the same in a peaceable manner.

Wherefore, said receiver denies that he should be ordered to surrender the possession of said premises to the said petitioner, or that he should be instructed by the court to bring any suit for the possession of the same; and the said receiver prays that he may be dismissed as to such petition with his costs in this behalf most wrongfully sustained.

ANDRIEUS A. JONES, *Receiver.*

32 TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

Andrieus A. Jones, being first duly sworn, upon his oath deposes and says: that he is the receiver appointed in the above entitled cause; that he has read the foregoing answer subscribed by him and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to the matters and things therein stated upon information and belief, and as to those matters and things he believes them to be true.

ANDRIEUS A. JONES.

Subscribed and sworn to before me this 10th day of November 1903.

[SEAL.] W. H. UNGLES,
Notary Public.

(Endorsed:) No. 609. District Court, San Miguel County. G. W. Stoneroad, vs. Wm. P. Beck. Answer to petition of St. Louis Land and Cattle Co. Filed in my office this 10 day of Dec. 1903. Secundino Romero, Clerk.

33 And afterwards, towit, on May 31st, 1904, the court made an order dismissing the motion to punish Geo. W. Harrison, Pres., for contempt, etc., which said order was filed in the office of said clerk, June 1st, 1904, and is in words and figures as follows, towit:

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

In the District Court, Fourth Judicial District.

No. 609.

GEORGE STONEROAD et al.
vs.
WILLIAM P. BECK et al.

This cause coming on to be heard on the rule to show cause heretofore issued upon the application of A. A. Jones, Esq., receiver, for certain portions of the Preston Beck Land Grant, No. — asking that Geo. W. Harrison, Esq., president of the St. Louis Cattle Company, be punished for contempt of court in having entered upon and taken possession of a certain piece or parcel of land, commonly known as the Perea Grant, the northern part of which said Perea Grant conflicts with the southern part of the said Preston Beck Land Grant, the land taken possession of by said Harrison being that part of the Perea Grant which is in conflict with the Preston Beck Grant, and the court having heard A. A. Jones, Esq., attorney for himself as receiver, and William B. Childers, Esq., attorney for G. W. Harrison, Esq., president of the St. Louis Cattle Company, and being fully advised in the premises, does hereby overrule the said motion that said G. W. Harrison be punished for contempt, and the said A. A. Jones, receiver, is hereby directed to return to the said St. Louis Land and Cattle Company, any part of said Perea Grant which may be in his possession as receiver; and the said A. A. Jones, receiver, is hereby authorized to bring any suit or suits which he may deem necessary to determine the title to that part of the Beck Grant and Perea Grant which is in conflict.

WILLIAM J. MILLS,
Chief Justice, etc.

Las Vegas, N. M., May 31st, 1904.

34 . (Endorsed:) No. 609. District Court Fourth Judicial District, County of San Miguel, Territory of New Mexico. Geo. W. Stoneroad et al., vs. Wm. P. Beck, et al. Order dismissing motion to punish Geo. W. Harrison, Pres. for contempt, etc. Filed in my office this 1st day of June, 1904. Secundino Romero, Clerk. Rec. M. p. 237.

And afterwards, towit, on the 6th day of June 1904, there was filed in said clerk's office a motion of A. A. Jones, receiver, for the modification of the order of court of May 31st 1904, in words and figures as follows, towit:

TERRITORY OF NEW MEXICO,
County of San Miguel:

In the District Court, Fourth Judicial District.

No. 609.

GEORGE W. STONEROAD et al.
vs.
WILLIAM P. BECK et al.

Now comes Andrieus A. Jones, heretofore appointed receiver in the above entitled cause, and moves the court to modify that certain order in the above entitled cause, dated May 31, 1904, and to vacate that part of said order whereby the said receiver is directed to return to the St. Louis Land and Cattle Company any part of the land of which he is in possession by his lessee, and that that part of said order directing the said receiver to surrenedr possession of any land to the said Cattle Company may be vacated and set aside, and for reasons of such motion, the said receiver presents the following:

First. By taking possession of said land under the order of the court as receiver certain rights of the parties to the above entitled cause became vested and they have had no notice or opportunity for a hearing as to whether or not the said receiver should surrender possession of any of said land to said Cattle Company.

Second. Substantially all of said land of which the receiver took possession has been leased to Hale I. Lutz and he has acquired rights in and to the same and has had no opportunity or notice whereby he could be heard respecting his rights and the effect of the order entered in this cause is to deprive him of his property without a hearing and without due process of law.

Third. The St. Louis Land and Cattle Company intervened in the above entitled cause, set up its claim of an interest in the land of which the said receiver has been appointed, and in effect petitioned the court for an examination pro interesse suo.

Upon that application a large amount of testimony was taken on behalf of the said Cattle Company, but the same was never presented to the court. The said receiver and the parties to said cause who claim title to said land adverse to the said Cattle Company have never had an opportunity to present any testimony in support of their respective claims. No notice has been given by the said Cattle Company, that the testimony on its behalf upon such intervention has been concluded.

Fourth. It appears from the undisputed evidence already taken in this cause and the affidavits on file, that at the time the said receiver took possession of the land claimed by the said Cattle Company, the same was not in the actual or constructive possession of said Cattle Company, with a possible exception of a stone house, and that the said receiver took possession of the said land peaceably and without opposition from any one.

Fifth. The said Hale I. Lutz, as lessee of said receiver and under contract with the receiver, has constructed upon said land eight or nine miles of fence and the cost of such fencing is to be paid by the receiver; said lessee now has the actual and exclusive possession of all of said land, with the exception of a small tract of land on which the stone house is situated.

Sixth. The record in this cause shows that the said Cattle Company has been made a party defendant to the intervention and
36 pleadings filed on behalf of Andrieus A. Jones, a claimant of interest in said property, and the said receiver should maintain possession through his lease, or otherwise, of all of the said land and real estate until the title is finally determined and adjudicated in this proceeding.

For the foregoing reasons, and other reasons apparent upon the record in this cause, the said court is respectfully asked and petitioned to vacate and modify said order, as above requested.

ANDRIEUS A. JONES,
Receiver, Petitioner.

(Endorsed:) No. 609. District Court, San Miguel County. Stoneroad et al. vs. Wm. P. Beck, et al. Motion for modification of order, Harrison, Contempt. Filed in my office this 6th day of June, 1904. Secundino Romero, Clerk.

And afterwards, towit, on July 1st, 1904, an order was signed by the court in said cause, and filed in the office of said clerk of said court on the 7th day of July 1904, in words and figures as follows, towit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK et als., Defendants.

In the Matter of the Proceedings Against George W. Harrison for Contempt.

It appearing to the court that the respective parties to this cause are unable to bring up for hearing on the 6th day of July
37 1904, the motion heretofore made in said cause for a rehearing of the contempt proceedings against the said George W. Harrison, and for a modification of the order heretofore entered in this cause, requiring said receiver to surrender possession of that certain tract of land known as the conflict between the Perea Grant and the Preston Beck Grant:

It is ordered by the court that said application for re-hearing be and is hereby postponed until the 20th day of August 1904.

It is further ordered, adjudged and decreed by the court, that until the further order of this court, the said George W. Harrison, his agents and employees, shall in no manner take possession of or interfere with the said receiver or Hale I. Lutz, in the possession of that portion of said conflict which has heretofore been enclosed with a fence or fences by the said Hale I. Lutz, as lessee of the said receiver.

Dated this 1st day of July, A. D. 1904.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 609. District Court, San Miguel county. George W. Stoneroad et al. vs. Wm. P. Beck, et al. Order. Filed in my office this 7th day of July 1904. Secundino Romero, Clerk. R. M. page 266.

38 And afterwards, towit, on August 20th 1904 there was filed in said clerk's office an order of the court, in words and figures as follows, towit:

In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et als.
versus
WILLIAM P. BECK et als.

In the Matter of the Proceedings for Contempt vs. George W. Harrison.

This cause having been set down for hearing upon this day upon the motion for a re-hearing upon an order in connection with the contempt proceedings against George W. Harrison, Esq., and the application of the St. Louis Land and Cattle Company for custody of a portion of the land involved in this proceeding known as the Peres Grant conflict and the said George W. Harrison appearing in person, and by William B. Childers, his attorney, and the said Andrieus A. Jones appearing, and the said Thomas B. Catron, not appearing:

It is hereby ordered by the court that this hearing be and is now continued until Friday September 16th 1904, at the hour of ten o'clock A. M., and is set down *preemptorily* for hearing at that time.

It is further ordered that the question of possession of the property in question remain in statu quo until said hearing and the further order of the court in the premises.

39 Done in Chambers at Las Vegas, New Mexico, this 20th day of August A. D. 1904.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 609. District Court, San Miguel county. G. W. Stoneroad, et als., vs. Wm. P. Beck, et als. Order. Filed in my office this 20th day of Aug. 1904. Secundino Romero, Clerk. R. M. P. 275.

40 At a Regular Term of the District Court of the Fourth Judicial District of the Territory of New Mexico, Begun and Held Within and for the County of San Miguel, at the Court-house Thereof, in the Town of Las Vegas, New Mexico, and Commencing on the 2nd Monday of November, 1904, the Same Being November 14th, 1904, for the Trial of Causes Arising under the Laws of the Territory of New Mexico.

Present: The Hon. William J. Mills, Chief Justice, etc., Hon. S. B. Davis, District Attorney, Cleofas Romero, Sheriff, Secundino Romero, Clerk.

And afterwards, towit, on Monday Nov. 28th 1904 the same being the 9th day of said term of court, the following among other proceedings were had, towit:

41 In the District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

No. 609.

GEORGE W. STONEROAD et al., Plaintiffs,
vs.
WILLIAM P. BECK et al., Defendants.

In the Matter of the Intervening Petition of St. Louis Land and Cattle Company and Order for Geo. W. Harrison to Show Cause Why He Should not be Punished for Contempt.

An order of the court having heretofore been entered in said cause discharging the said George W. Harrison, and upon application of The St. Louis Land and Cattle Company, directing the receiver, in said cause, Andrieus A. Jones, to deliver possession of that certain portion of the land of which the said receiver had taken possession, and which is known and designated as the over-lap between the Perea and the Beck Grant, and a motion for a re-hearing upon said order and intervening petition having been filed within ten days after the entry of such order, and Thomas B. Catron and Andrieus A. Jones, two of the Intervenors in said cause, having appeared and answered the intervening petition of the St. Louis Land and Cattle Company, and the court having heard Thomas B. Catron, Esq., and A. A. Jones, Esq., in support of said motion for re-hearing, and the course of procedure to be taken in said cause, and having heard Wm. B. Childers, Esq., Solicitor for the St. Louis Land and Cattle

Company, and George W. Harrison, in opposition to said motion, and the court being now fully advised in the premises:

It is ordered, adjudged and decreed by the court said motion for a re-hearing be and is hereby granted, and that the order heretofore entered in this cause discharging the said George W. Harrison, and directing the said receiver to surrender possession of any land
42 claimed by the Intervenor, The St. Louis Land and Cattle Company, be and is hereby suspended until otherwise ordered by the court.

It is further ordered, adjudged and decreed by the court that William E. Gortner, Esq., heretofore appointed special master in said cause, be and he is hereby authorized and directed to take the testimony which may be submitted by or on behalf of any of the parties to said cause, or any intervenors therein, touching the claim of said The St. Louis Land and Cattle Company, to any part or portion of the land and real estate of which the said Andrieus A. Jones was heretofore appointed receiver; and that the said receiver and the said Thomas B. Catron, and Andrieus A. Jones are hereby allowed sixty days' time from date hereof, within which to present to such special master, evidence on their behalf, or on behalf of either of them, touching the matters and things relating to said petition of said The St. Louis Land and Cattle Company, and that said, The St. Louis Land and Cattle Company be and is hereby allowed thirty days thereafter in which to produce such rebuttal testimony as it may desire to introduce in said cause, and that thereafter the other parties to said cause shall have a period of ten days' time in which to introduce their rebuttal testimony.

It is further ordered, adjudged and decreed by the court, that the testimony heretofore taken by and on behalf of The St. Louis Land and Cattle Company shall be and remain evidence in said cause, subject to such objections as counsel opposing the intervening petition of said Cattle Company may desire to interpose as to relevancy, competency and materiality of the said testimony, and the parties opposing the intervening petition of said Cattle Company may recall any of said witnesses who may be accessible for further cross examination.

Done at Las Vegas, New Mexico this 17th day of November A. D. 1904.

WILLIAM J. MILLS,
Chief Justice.

And afterwards to-wit on August 26th, 1908 there was filed
43 in said clerk's office a final decree of the court, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of San Miguel:

In the District Court, Fourth Judicial District, Sitting Within and for the County of San Miguel, for the Trial of Causes Arising Under the Laws of the Territory of New Mexico.

No. 609.

GEORGE W. STONEROAD et als.
vs.
WILLIAM P. BECK et als.

In the Matter of the Proceeding Against George W. Harrison for Contempt, and the Intervention of the St. Louis Land and Cattle Company.

Final Decree.

This cause coming on to be heard upon the finding of facts and conclusions of law, and upon the additional finding of facts, heretofore found by the court, and it appearing to the court that no objections or exceptions to the finding of facts or to the additional finding of facts, or to the conclusions of law, heretofore found by the court, have been filed by the said George W. Harrison, or by the intervenor, the St. Louis Land and Cattle Company, or by the plaintiff or receiver, although the time for the filing of such objections and exceptions has long since expired, and the court being fully advised in the premises, doth hereby make the following order, judgment and decree, to-wit:

It is ordered, adjudged and decreed, that the intervenor, the St. Louis Land and Cattle Company, has no right, title or interest in or to any part of the lands within the surveyed and patented boundaries of the Preston Beck grant, and so far as the Preston Beck grant and the Perea grants over-lap, such over-lap is hereby decreed to be the property of the owners of the Preston Beck grant; and,

44 It is further ordered, adjudged and decreed, that the petition of said intervenor, the St. Louis Land and Cattle Company is hereby dismissed, and the said intervenor, the St. Louis Land and Cattle Company is hereby ordered to surrender possession to Andrieus A. Jones, Esq., receiver herein, of any part or portion of said over-lap, of which the said intervenor, the St. Louis Land and Cattle Company, or its agents, servants, lessees or employees may now be in possession; and,

It is further ordered, adjudged and decreed, that said intervenor, the St. Louis Land and Cattle Company, pay the costs of the intervention to be taxed by the clerk of this court; and,

It is further ordered, adjudged and decreed, that George W. Harrison, be and he hereby is adjudged guilty of a contempt of this court, but the court finds that as such contempt was committed under advice of counsel, it is only technical, and the said George W. Har-

rison is hereby discharged and purged from such contempt, on paying the costs to be taxed, incurred herein in such contempt proceedings; and,

It is so ordered.

Dated at Las Vegas, N. M., this 25th day of August, A. D. 1908.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 609. District court, San Miguel county. George W. Stoneroad, et al., vs. William P. Beck et als. In the matter of the proceedings against George W. Harrison, for contempt, and the intervention of the St. Louis Land and Cattle Co. Final decree. Filed in my office August 26, 1908. Secundino Romero, Clerk. Ent. Rec. N. p. 579.

And afterwards, to-wit, on the — day of October, 1908, there was filed in said clerk's office a motion of the St. Louis Land and Cattle Company, praying an appeal to the supreme court of the territory, and an order of court granting said appeal in words and figures as follows, to-wit:

45. TERRITORY OF NEW MEXICO,
County of San Miguel:

In the District Court.

No. 609.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK, Defendants.

Comes now the St. Louis Land and Cattle Company and prays an appeal to the supreme court of the Territory of New Mexico from the judgment heretofore rendered against it on the 25th day of August, 1908, in the above entitled cause.

THE ST. LOUIS LAND AND CATTLE COMPANY,
By Messrs. CHARLES A. SPIESS AND STEPHEN B. DAVIS, JR.,
Its Attorneys.

The above and foregoing motion being duly considered, it is ordered by the court that the appeal prayed for by the St. Louis Land and Cattle Company, be allowed, which said appeal shall operate as a supercedeas of the judgment appealed from upon the giving by said the St. Louis Land and Cattle Company, within — days from the date hereof, of a bond in the sum of five thousand dollars, conditioned as provided by law, and to be approved as to form and sufficiency of sureties by the clerk of this court.

Dated at Raton, N. M., this — day of October, A. D. 1908.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards, to-wit, on October 9th, 1908, there was filed in said clerk's office an appeal and supercedeas bond, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of San Miguel:

In the District Court.

No. 609.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK et als., Defendants.

Know all men by these presents: That we, the undersigned, the St. Louis Land and Cattle Company, as principal, and
46 Solomon Luna and Willard S. Strickler, as sureties, are held and firmly bound unto Andrieus A. Jones, receiver, in the above entitled cause, and to the other parties in said cause, as therein may appear, in the just and full sum of five thousand dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents:

Sealed with our seals, and dated this first day of October, A. D. 1908.

The condition of the foregoing obligation is such, that whereas, a final decree was entered in the above entitled cause on the 25th day of August, A. D. 1908, adjudging among other things, that the above bounden principal has no right, title or interest in or to any part of the lands within the survey of the Preston Beck grant, and ordering dismissing the petition of the said above bounden principal, and ordering the said above bounden principal to surrender possession to the said Andrieus A. Jones, as receiver as aforesaid, of certain portion of the said Preston Beck grant, of which the said St. Louis Land and Cattle Company, its agents, servants, lessees and employés, were taken in possession. And whereas, the said above bounden principal is about to appeal from the decree aforesaid, which said appeal is to operate as a supercedeas of said decree, and the Honorable William J. Mills, Chief Justice, etc., has fixed the sum of five thousand dollars as the amount of bond to be given by the above bounden principal for such appeal and supercedeas.

Now, therefore, if the said above bounden principal shall prosecute its said appeal with due diligence in the supreme court of the territory of New Mexico, and if the decision of the district court of San Miguel county, New Mexico, be affirmed, or the appeal aforesaid be dismissed, shall comply with the decree of the district court of San Miguel county aforesaid, and shall pay all damages and costs that may be adjudged against it in the said district court on

said appeal, then and in that event this obligation to be null and void, otherwise to be and remain in full force and effect.

47 ST. LOUIS LAND AND CATTLE CO.,
By GEORGE W. HARRISON, *President.*

SOLOMON LUNA. [SEAL.]
WILLARD S. STRICKLER. [SEAL.]

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

On this 1st day of October, A. D. 1908, before me, the undersigned, a notary public, in and for the above county and —, personally appeared George W. Harrison, who being by me duly sworn did say that he is the president of the St. Louis Land and Cattle Company, a corporation; that the seal attached to the foregoing instrument is the seal of the said corporation and that the foregoing instrument was signed and executed by him and the said seal thereto attached by authority of the board of directors of the said corporation; and the said George W. Harrison acknowledged the foregoing instrument to be the free act and deed of the said corporation; and personally appeared Solomon Luna and Willard S. Strickler, sureties in the foregoing instrument, and each for himself, and not one for the other acknowledged that he signed, sealed and executed the same as his free act and deed; and each of said named sureties being first duly sworn each for himself deposes and says, that he is worth in money and property situated in the Territory of New Mexico, and subject to execution therein, over and above all his just debts and liabilities, the sum of five thousand dollars.

[N. P. SEAL.] R. M. MERRITT,
Notary Public.

(Endorsed:) No. 609. In the District Court, County of San Miguel. George W. Stoneroad, et als., vs. Wm. P. Beck, et als. Appeal and supercedeas bond. Filed in my office October 9, 1908. Secundino Romero, Clerk. Chas. A. Spiess and S. B. Davis,
48 Jr., F. Las Vegas, N. M., attorneys for intervenor.

And afterwards, to-wit, on the 28th day of January, A. D. 1909, there was filed in said clerk's office, a citation, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of San Miguel:

In the District Court, Fourth Judicial District.

No. 609.

GEORGE W. STONEROADS et als.
vs.
WILLIAM P. BECK et al.

In the Matter of the Intervention of The St. Louis Land and Cattle Company.

Citation.

To Andrieus A. Jones, Receiver, etc, Greeting:

Whereas, The St. Louis Land and Cattle Company, one of the defendants in said cause, has made appeal to the supreme court of the Territory of New Mexico, from the judgment rendered in the district court of the Fourth Judicial District of the Territory of New Mexico, within and for the county of San Miguel, and has filed security required by law.

You are hereby cited to appear before the said supreme court at Santa Fe, New Mexico, on the 24th day of August, A. D. 1909, that being the return day of said appeal, then and there to answer said appeal.

Witness the Honorable William J. Mills, Chief Justice of the Territory of New Mexico, and Judge of the Fourth Judicial District Court thereof, and the seal of said court, this 28th day of January, A. D. 1909.

[SEAL.] SECUNDINO ROMERO,
Clerk of said Court.

And afterwards towit, on the 29th day of January, 1909, there was returned into said clerk's office, the citation, with returne of the sheriff thereon, in words and figures as follows, to-wit:

49 TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

I, the undersigned, sheriff of the county of San Miguel, Territory of New Mexico, do hereby certify that the within citation was received by me on the 28th day of January, 1909, and that I served the same upon the attorney for plaintiff, Andrieus A. Jones, at East Las Vegas, New Mexico, in my said county of San Miguel on the 29th day of January, A. D. 1909, by handing to said Andrieus A. Jones, of counsel for plaintiff, a true and correct copy of said citation and summoning him as therein commanded.

Witness my hand this 29th day of January, 1909.

CLEOFES ROMERO,
Sheriff of San Miguel County, N. M.

Fees, $1.50.

50 TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

I, Secundino Romero, Clerk of the Fourth Judicial District court of the Territory of New Mexico, sitting within and for the county of San Miguel, do hereby certify that the above and foregoing contains a true and perfect transcript of the record, proceedings and papers, in case No. 609, district court of San Miguel county (as called for by the præcipe filed in said case) lately pending in said court, entitled George W. Stoneroad, et als., plaintiffs, vs. William P. Beck, et al., defendants. In the matter of the intervention of the St. Louis Land and Cattle Company, as the same remain of record and on file in my office.

Witness my hand and the seal of said court this 1st day of February, A. D. 1909.

[SEAL.] SECU-DINO ROMERO, *Clerk.*

51 And Afterwards, on towit, on the 24th day of August, A. D., 1909, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures towit:—

In the Supreme Court of the Territory of New Mexico.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK et als., Defendants.

In the Matter of the Intervention of the St. Louis Land & Cattle Company.

Assignment of Errors.

Comes now appellant in the above entitled cause and files the following assignment of error-:

1. The district Court of San Miguel County erred in its first conclusion of law that this appellant has no title or interest in or to any part of the land within the surveyed boundaries of the Preston Beck Grant, and that so far as the Preston Beck Grant and Perea Grant conflict or overlap, such conflict is a portion of the Preston Beck Grant and is the property of the owners thereof.

2. The said Court erred in its second conclusion of law that this intervenor is not entitled to the relief prayed for in its intervening petition, and that such petition should be denied.

3. That the said court erred in finding that the receiver in the above entitled cause is entitled to the possession of all of said conflict or overlap between the Perea and the Preston Beck Grant.

4. The court erred in failing and refusing to order the said receiver to restore the possession of the said overlap to the intervenor herein.

Whereof, appellant prays that the order and decree of the
52 said district court may be vacated, reversed and held for naught.

CHAS. A. SPIESS,
S. B. DAVIS, JR.,
Las Vegas, New Mexico, Attorneys for Intervenor.

And Afterwards, on towit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January A. D., 1909, on the Sixteenth day thereof, the same being Friday, August 27th, A. D., 1909, the following among other proceedings were had and entered of record towit:—

No. 1288.

GEORGE W. STONEROAD et als., Appellants,
vs.
WILLIAM P. BECK et als., Appellees.

Appeal from District Court, San Miguel County.

This cause coming on for hearing upon the transcript of record assignment of errors and briefs of counsel, is argued by S. B. Davis, Jr. and C. A. Spies, Esq. for appellant and A. A. Jones, Esq. for Appellees, and submitted to the court, and the court not being sufficiently advised in the premises takes the same under advisement.

And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday, after the first Monday in January A. D., 1912, on the first day thereof, the same being Wednesday, January 3rd, A. D., 1912, the following among other proceedings were had and entered of record towit:—

53 No. 1288.

GEORGE W. STONEROAD et als., Appellants,
vs.
WILLIAM P. BECK et als., Appellees.

Appeal from District Court, San Miguel County.

This cause having been argued by counse-, submitted to and taken under advisement by the court upon a former day of the presen- term, and the court being now sufficiently advised in the premises announces its decision by Associate Justice Mechem, Chief Justice Pope and Associate Justices McFie, Abbott and Parker concurring, reversing the judgment of the court below and remanding this cause to the court below for further proceedings for reasons

stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the district Court in and for the County of San Miguel, whence this cause came into this court, be and the same hereby is reversed and this cause hereby is remanded to the said district court for further proceedings: It is further considered and adjudged by the court that the appellant do have and recover of the appellee their costs in this behalf expended to be taxed, for which let execution issue.

And Afterwards, on towit, on the 4th day of January, A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in the following words and figures towit:—

In the Supreme Court of the Territory of New Mexico.

No. 1288.

GEORGE W. STONEROAD et al., Appellees,
vs.
WILLIAM P. BECK et al., THE ST. LOUIS LAND & CATTLE COMPANY, Intervenor, Appellants.

Now come the appellees in the above entitled cause and
54 move the court to grant a regearing of said cause for the following reasons, towit:—

1. From the face of the record it appears that this court was in error in holding that the appellees depend "not upon their rights as grantees of the United States but upon an antecedent title", whereas it appears by the record that the appellees depended both upon their antecedent title and upon the rights as grantees of the United States.

2. The court was in error in holding that "the appellees must accept the burden of establishing a perfect legal title or right independent of their title by the Act of Confirmation."

3. This court is in error in holding that on December 23, 1823, the Political chief of New Mexico had no authority to make grants of public lands. In so holding this court fails to properly apply the law as announced by the Supreme Court of the United States in the cases of Ely's Administrator v. United States, 171 U. S, 220; and the case of the United States v. Peralta, 19 Howard 347; and United States v. Arredondo, 6 Peters 691.

4. The court failed to give due and proper effect to the Plan of Iguala, the Treaty of Cordova, and the Order of the Provisional Junta of Mexico of the 5th day of October 1821.

5. This court is in error in holding that the Regency and the Congress of Mexico decided that the power of the Governor or political chief to make grants of land was abrogated by the overthrow of Spanish rule. The appellees have been unable to find any authority for this finding of the court in this case.

6. This court is in error in finding that "in this case nothing further was done by any Mexican official to confirm and ratify the act of the political chief". The record in this case shows that in August, 1825, the grantor of appellees was placed in juridical possession of this land, and that he was permitted by the Mexican authorities to remain in possession until the change of sovereignty, and that the title papers to this grant remained in the archives
55 of the Mexican government until the change of sovereignty, and are now in the custody of the officials of the United States having possession of such archives.

7. The court erred in holding that the Beck Grant was not a perfect grant under the laws of Mexico, and in declining to hold that the grantors of the appellees in this case had a good and perfect title to the tract of land in dispute in this proceeding at the time of the change of sovereignty from Mexico to the United States.

8. The court failed to consider the question as to whether or not the appellees had a better title to the lands in controversy than the appellant under the authority of the Mexican government, even though such title might be only equitable, and also failed to consider the question whether or not the appellees had a better right to the possession of the property under the acts and things done by the Mexican government, its officials and by the grantors of the appellees prior to the change of sovereignty.

9. The court failed to give proper effect and consideration to the former decision of this court rendered in the case of Pino v. Hatch, 1 New Mexico, 125, which had become a rule of property in New Mexico directly applicable to the land in controversy in this cause. This case holds that the political chief of New Mexico and Provincial Deputation had authority to control and regulate the possession of the public domain, and that any one so in possession of the land had the absolute right to the possession as agains- anyone not claiming or having a better right. This case is authority in its narrowest sense for the proposition that under the Mexican government the grantors of the appellees had a lawful possession of the property in question at the time of the change of sovereignty, and this court has erred in failing to hold that by virtue of such lawful possession only the appellees in this case are entitled to retain possession. If, as argued by this court, the confirmations of
56 the parties to this cause are equal, then the lawful possession of the appellees should be sufficient to entitle them to retain possession, and to a decision of this court that they have a better title to the land in controversy than the appellants.

10. This court is in error in its conclusions where it announces the contention of appellees to be that at the time Congress confirmed the Perea Grant that the United States had no title to convey, in holding that "to establish this fact they must prove a perfect title and to do that show affirmatively that the officer making the grant had power to make it." This conclusion overlooks the fact that the grantor of appellees was proceeding before the Surveyor General of New Mexico to obtain a confirmation of his title before any pro-

ceedings were instituted by the owners of the Perea Grant, whereby a confirmation was sought to be obtained.

11. The court has insufficiently considered and improperly applied the law as announced by the Supreme Court of the United States in the case of Dent v. Emmeger, 14 Wall. 308, as such case properly construed is not authority for the proposition to which it is quoted by this court.

12. This court was in error in failing to find that the confirmation by Congress of the Beck Grant did not by the doctrine or relation relate back to the filing of the notice or petition for confirmation with the Surveyor General of New Mexico. In considering this question the court failed to give force and effect to the decision of the court in the case of Astiazaran v. Santa Rita Land Company, reported in 148 U. S., where the court held that the filing of the notice or petition before the Surveyor General operated to place the lands involved sub judice so that the title of the United States pending action by Congress upon such notice of petition —.

13. This court has erroneously decided that the decision of the United States Supreme Court upon the doctrine of relation as applied to petition for confirmation of grants by the Board of
57 Land Commissioners of California are not controlling by analogy in cases involving the doctrine of relation as applied to notices or petitions filed before the Surveyor General of New Mexico.

14. This court has failed to consider the legal effect of the United States government in surveying and approving the survey of the Beck Grant prior to any survey of the Perea Grant.

15. This court is in error in finally deciding that the intervenor and appellees "have each an equal undivided moity of the lands within the conflict."

16. For other reasons apparent upon the face of the record and in the opinion of the court, and which appellees have not time to consider and present in this motion for rehearing, believe that this motion should be granted.

JONES & ROGERS,
Attorneys for Appellees.

Santa Fe, N. M., January 4, 1912.

And Afterwards, on the Second day of the said January Term, A. D., 1912, the same being Thursday, January 4th, A. D., 1912, the following among other proceedings were had and entered of record towit:

No. 1288.

GEO. W. STONEROAD et al., Appellees,
vs.
WM. P. BECK et al., Appellants.

Appeal from District Court, San Miguel County.

This cause coming on before the court upon the motion of appellees for a rehearing herein and the court having consented to an

oral argument, It is argued by Charles A. Spiess, Esq. for appellants and A. A. Jones, Esq. for appellees and submitted to the court and the court not being sufficiently advised in the premises takes the same under advisement.

58 And Afterwards, on towit, on the second day of the said regular term, the same being Thursday, January 4th, A. D. 1912, the following among other proceedings were had and entered of record towit:

No. 1288.

GEO. W. STONEROAD et al., Appellees,
vs.
WM. P. BECK et al., Appellants.

Appeal from District Court, San Miguel County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon the motion of appellee herein for a rehearing, and the court being now sufficiently advised in the premises, announces its decision per Curiam, denying the motion for a rehearing and adhearing to its former opinion heretofore filed herein, but modifyinh the judgment heretofore entered herein, and entering a final judgment in this court, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the district Court in and for the County of San Miguel, whence this cause came into this court, be and the same hereby is modified to the extent that the court doth find that the intervener, The St. Louis Land & Cattle Company is possessed in fee simple of, and is entitled to the possession of an undivided one-hald interest of the lands and premises within the conflict between the said Preston Beck Grant and the Perea Grant, and that the other undivided one-half of said lands in conflict belongs to and is the property in fee simple of the owners of saod Preston Beck Grant and that said Receiver is entitled to the possession thereof.

Now Therefore, It is considered and adjudged that the intervenor the St. Louis Land & Cattle Company do have an recover of and from said Andrieus A. Jones, Receiver of the Beck Grant, the possession of the undivided one-half of all that portion of the said Preston Beck Grant which is in conflict with and overlaps
59 the boundaries of the Perea Grant according to the official field notes and surveys of said grants on file in the office of the Surveyor General of New Mexico, and it is

Further Considered and Adjudged that the said Andreius A. Jones, do have and recover of and from the said intervenor the St. Louis Land & Cattle Company, the possession of the undivided one-half of any part or portion of the lands within said conflict or overlap of which the said intervenor the St. Louis Land & Cattle Company or its agents, servants, lessees or employés may not be in possession, and it is further ordered and adjudged by the court that the appellant do have and recover of and from said Andreius

A. Jones, as Receiver its costs in this behalf expended to be taxed, for which let execution issue.

And Afterwards, *on* towit, on the 4th day of January A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an affidavit of value in the above entitled cause, which said affidavit of value was and is in the following words and figures towit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1912.

No. 1288.

GEORGE W. STONEROAD et al., Appellees,
vs.
WILLIAM P. BECK et al., Appellants.

Appeal from District Court, San Miguel County.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

Andreius A. Jones, being first duly sworn according to law, deposes and says that he is the Receiver and appellee in the above entitled cause and that he is the party who has prayed for an appeal of said cause to the Supreme Court of the United States. Affiant further states that he is familiar with the tract of land the
60 title and possession of which are involved in this proceeding; that said tract of land contains about five thousand (5,000) acres and that the same has an actual market value of more than ten thousand ($10,000) dollars.

ANDREIUS A. JONES.

Subscribed and sworn to before me this 4th day of January, A. D. 1912.

[SEAL.] JOSE D. SENA,
Clerk Supreme Court.

And Afterwards, on towit, at a regular term of the supreme court of the Territory of New Mexico, on the second day thereof, the same being Thursday, January 4th, 1912, the following among other proceedings were had and entered of record towit:

No. 1288.

GEORGE W. STONEROAD et al., Appellees,
vs.
WM. P. BECK et al., Appellants.

Appeal from District Court, San Miguel County.

This cause again coming on before the court upon the motion of appellee herein for a statement of facts by this court in the nature of

a special verdict, and asking the court to fix the amount of a supersedeas Bond herein and for an appeal from the judgment of a decree of this court to the Supreme Court of the United States and the court being sufficiently advised in the premises grants the said motion;

*O*t is therefore considered and adjudged by the court that the statement of facts heretofore filed in this cause and duly signed by the Chief Justice and now on file in the office of the Clerk of this court be and the same hereby are made the statement of facts of this court in the above entitled cause in the nature of a special verdict on appeal to the Supreme Court of the United States.

61 It is further considered and adjudged by the court that the Supersedeas Bond herein be and the same hereby is fixed at the sum of Two Thousand dollars, to be conditioned as provided by law and approved *ny* one of the judges of this court.

It is further considered and adjudged by the court that the appellee herein do have and hereby is granted an appeal from the judgment and decree of this court to the Supreme Court of the United States.

And Afterwards, *on* to wit, on the said the 4th day of January, A. D., 1912, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a Finding of facts by the Supreme Court of the Territory of New Mexico, in the nature of a special verdict, which said finding of facts in the nature of a special verdict was and is in the following words and figures towit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1912.

No. 609.

GEORGE W. STONEROAD et al.
vs.
WILLIAM P. BECK et als.

In the Matter of the Intervention of the St. Louis Land and Cattle Company.

ST. LOUIS LAND AND CATTLE COMPANY, Intervenor and Appellant,
vs.
ANDREIUS A. JONES, Receiver, Appellee.

Finding of Facts by the Supreme Court of the Territory of New Mexico to Be Filed in said Cause and to Become a Part of the Record in said Cause upon Appeal to the Supreme Court of the United States.

1. This cause in chancery was commenced in the District
62 Court for the County of San Miguel in the Territory of New Mexico, by the filing of a bill of complaint on the 21st day of

January A. D., 1876, by George W. Stonsroad, et al., as complainants, against William P. Beck, et al., as defendants, for the purpose of having partitioned among the parties to said cause that certain tract of land known as the Preston Beck Grant. Said bill of complaint appears in the record of this cause. Thereafter, notice by publication was given in said cause, as appears by the record in this court. Numerous appearances were entered and pleadings filed in this cause and in 1890 a portion of the tract of land described in the complaint was segregated to certain of the complainants, but said segregated portion did not include any part of the land involved in the hearing upon this intervention of the St. Louis Land and Cattle Company.

2. On February 28th, 1903, Andrieus A. Jones was appointed Receiver of that part of the Preston Beck Grant which had not thus been finally segregated, said appointment of said Receiver appearing as a part of the record in this cause, and such appointment directed the Receiver to take possession of such property and lease the same, and this direction included the lands claimed by the said intervenor.

3. On August 24th, 1903, the St. Louis Land and Cattle Company filed a petition in said cause which said petition by way of intervention appears in the record in this cause. Subsequently, the said Receiver and individual parties to the partition proceedings filed answers to the petition of the intervenor which said answer of the Receiver appears as a part of the record in this cause.

4. On the 23rd day of October 1903 the said Receiver filed a petition in said cause for an order directed to George W. Harrison requiring him to show cause, if any he had, why he should not be attached and punished for contempt of court in interfering with the possession of said land and real estate by the Receiver, which said petition appears as a part of the record in this cause.

63 Upon this petition an order as prayed for was issued and served upon said Harrison returnable November 10th, 1903, which said order appears as a part of the record in this cause. Said George W. Harrison appeared and filed an answer to the said petition upon which said order to show cause had been issued, which said answer appears as a part of the record in this cause. Subsequently, an examiner was appointed by the court to take testimony of all parties in reference to the issues formed on the intervening petition of the St. Louis Land and Cattle Company and the petition alleging the said Harrison to be in contempt of court as aforesaid. The parties appeared before the examiner and a great amount of testimony was introduced by the intervenor and George W. Harrison showing the title and possession of themselves and their grantors in and to the land in controversy, and the Receiver and other parties introduced testimony as to the title and possession of the owners of the Beck Grant in and to the said overlap or the lands in controversy. Both of the said causes were jointly heard and decided by the court, which said decision and final decree of the district court appears as a part of the record in this cause. From this final decree the intervenor the St. Louis Land and Cattle Company took an appeal to the

Supreme Court of the Territory of New Mexico, and cited the said Andrieus A. Jones, Receiver, to appear as appellee.

5. The claim of the intervenor, the St. Louis Land and Cattle Company to the land in controversy is founded upon the following facts:

(a) Certain proceedings before and by the Territorial deputation of New Mexico as recorded in the records of said Territorial deputation and which translated into the English language are as follows:

64 Office of the Secretary of the Most Excellent Territorial Deputation of New Mexico.

Public Session, March 3, 1825.

I, the undersigned, secretary of the most excellent territorial deputation of New Mexico, certify that on the 43rd page of book 2nd, wherein are recorded the journals of the session of its excellency, appears a report made to said honorable body, upon a petition the tenor of which literally copied is as follows:

MOST EXCELLENT SIR: Citizen Pedro Jose Perea, a resident of the jurisdiction of Sandia, appears before your Excellency, stating that for the period of nine years he has occupied officiously, (?) and as a commoner, a farm situate on the opposite side of the Pecos river, below Los Esteros, and as your excellency is granting lands at the same place, or in its vicinity, he is necessarily compelled to request your excellency by virtue of the authority conferred upon you by law to grant possessions, to be pleased to order that it be declared as legitimate property on the same terms as have been granted to Don Antonio Sandoval, resident of Los Padillas—that is, marking out one league in each direction, commencing on the north at the junction of the Arroyo de los Esteros with the Pecos river, and from the termination of this league as a center, the distance in the remaining three directions, be marked out the land therein embraced, not having been declared to be the property of anyone, nor the right of possession to which I refer having been given; for the reasons given, he prays and requests your excellency to grant to him the aforesaid tract, having possessed it in the most legal manner, and not having been claimed by any authority or private individual, by which he will receive grace.

PEDRO JOSE PEREA.

Santa Fe, November 30, 1824.

Session of the 20th Day of December, 1824.

This petition is referred to the political chief of this territory to report immediately hereafter upon the petition of Don
65 Pedro Jose Perea, asking for lands in the center of the Colorado and Pecos rivers, bearing in mind the action taken by this deputation on the 19th of November last past, in regards to

grants. Bartolome Baca, president; Antonio Ortiz, Pedro Garcia, Jose Francisco Baca, Jose Francisco Ortiz, Pedro Bautista Pino, Matias Ortiz, Juan Bautista Vigil, secretary,

MOST EXCELLENT SIR: Informed of the action of your excellency, contained in the foregoing resolution, and having before me the action taken by your excellency, in session of the 19th of November last, in paragraph 5 of the aforesaid action, which your excellency requires me to bear in mind, I have to report to your excellency as follows:

According to the resolution of your Excellency, passed at the session of the 19th of November last, and having granted to Citizen Antonio Sandoval, one league in each direction, at the point called "Agua Negra," I think Citizen Pedro Jose Perea, has the right to expect a grant of the land, which besides being on the opposite side of the Pecos river, has been legally occupied by him for the period of nine years, as mentioned in his petition, specifying that only one league towards each of the cardinal points of the compass be granted to him, and if your excellency changes this policy in the future, increasing the amount of lands, others may ask far beyond one league in each direction, your excellency will not do otherwise than open a door for innumerable claims; and further, when your excellency has resolved that no grants will be made to individuals between the Pecos and Del Norte Rivers, so as by this means to avoid injuring the entire population, by depriving them of a locality wherein to pasture their herds and flocks in time of war with the barbarous Indians.

The result, most excellent sir, will be, that any want of penetration, or forgetfulness of precedents, in a matter of so much importance in the convenience of the inhabitants, will produce fatal results, and will operate against the honor and decorum which the acts of your excellency are entitled to. For these reasons, and there being no objections in granting to Don Pedro Jose Perea the land he
66 solicits, and which he has occupied for the number of years mentioned in his petition, your excellency may proceed, if this report meets with your approval, to grant to him the land he solicits, executing to him a deed therefor in like manner as has been customary for your excellency to do with other individuals to whom lands have been granted between the Colorado and Pecos rivers. God preserve your excellencies many years.

BARTOLOME BACA.

Santa Fe, February 25, 1825.

Most Excellent Territorial Deputation.

Session of the 3d of March, 1825.

On the 43rd page of Book 2d, of the proceedings of the most excellent territorial deputation of the territory of New Mexico will be found the following: "The deputation proceeded to the reading of two reports made by the political chief presiding upon application for land made by Don Antonio Chavez, and Don Pedro Jose Perea,

upon being informed of which, its excellency resolved that the lands be granted to the parties petitioning for the same, depositing the original proceedings in the office of the secretary of its excellency, as is in such cases provided, agreed upon and ordered, giving to the parties interested the proper copies, which are to answer as title deeds, with which Don Antonio Chavez will present himself to the justice of Socorro, who will place him in possession, and Don Pedro Jose Perea to Don Estevan Pino, for the same purpose."

The above is a true and legal copy of the original from which, and in testimony thereof, and by direction of the most excellent territorial deputation of New Mexico, the present copy is taken, and from which I have given to the parties interested the proper certified copy which will serve them as title.

JUAN BAUTISTA VIGIL, *Secretary.*

SANTA FE, *March* 5, 1825.

NOTE.—This copy is made on common paper, there being none of the proper stamp in all the territory.

Fee for all the proceedings, twenty dollars.

SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *July 13th*, 1857.

The Foregoing is a correct translation of the original on file in this office.

DAVID V. WHITING, *Translator.*

SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *September* 22, 1857.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

67 (*b*) Prior to the 15th day of May 1857, Jose Leandro Perea succeeded to whatever title the said Pedro Jose Perea had by virtue of the foregoing documents in and to the lands therein described, and on said date Jose Leandro Perea filed in the office of the Surveyor General of the Territory of New Mexico, a petition in words and figures as follows:

"*Notice.*

TERRITORY OF NEW MEXICO,
County of Santa Fe:

Your petitioner, Jose Leandro Perea, a resident of the county of Bernalillo, in the Territory of New Mexico, would respectfully state to you that, on the 3rd day of March, A. D., 1825, there was granted to one Pedro Jose Perea, by the territorial deputation of New Mexico, a tract of land situate in the Territory of New Mexico, on the river Pecos, described as follows, towit: Commencing at the junction of the Arroyo de los Esteros and the Rio Pecos, and running thence

one league to the south as a centre, and from the said centre one league to the three remaining cardinal points, as will more fully appear by reference to his title, dated 5th of March, 1825, being a copy of the grant signed by Juan Bautista Vigil, secretary of said deputation, and marked as Exhibit A. Herein your petitioner further states that said Pedro Jose Perea, the father of your petitioner, conveyed to your petitioner the premises aforesaid on the 15th day of December A. D., 1856, as will appear by reference to a deed of that date, hereby made a part of said petition, marked as Exhibit B. Herein your petitioner further states, that said tract of land has no other claimant known to your petitioner, and has remained in the occupancy of the said Pedro Jose Perea, and your petitioner, from the time of said grant up to the present time, having been used for grazing purposes when it could be done with safety from the Indians.

68 Your petitioner further states that the said land has never been surveyed; but the starting point is a permanent place, well known, and easily found, and the measurement of said land can be easily made, and the exact number of acres correctly ascertained. Your petitioner asks the consideration of his case, and that such steps be taken in the premises as will insure him a valid title to said land, under the act of Congress, passed for such purposes, and as in duty bound he will ever pray &c.

JOSE LEANDRO PEREA,
By JOHN S. WATTS, *His Attorney.*

General Wm. Pelham, Surveyor General of New Mexico.

SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *September* 22, 1857.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General."

(c) On September 15th, 1857, the Surveyor General for New Mexico, filed his decision upon the petition of said Jose Leandro Perea in his said office, which said decision is as follows:

69 No. 7.

Decision.

Jose Leandro Perea, Present Claimant, by Virtue of a Transfer from Pedro Jose Perea, Original Grantee.

This case was filed in this office on the 15th day of May, 1857, and set for trial on the 8th day of August, 1857, and continued until August 31.

On the 30th day of November, 1824, Pedro Jose Perea petitioned the political chief, or acting governor, for a tract of land situate on the Pecos river, with the following boundaries: Commencing on the north at the junction of the Arroyo de los Esteros with the Pecos

river, and from the termination of one league as a centre, one league to be marked out towards the remaining three points of the compass, as being his claim to the land petitioned for upon the peaceful and quiet occupancy of the same for a period of nine years previous to the date of the petition.

On the 20th day of December, 1824, the above mentioned petition was referred by the territorial deputation to Barolome Baca, the political chief, requiring him to report on the expediency of complying with the request of the petitioner.

On February 25th, 1825, Bartolome Baca, in a lengthy report, setting forth the condition of the province, and the advan-
70 tages to be derived from reducing the public lands to private property, recommends that the grant solicited by the petitioner be made, which was one by the territorial deputation on the 3rd day of March, 1825, ordering the grantee to present himself to Juan Estevan Pino, a justice of the peace, to be placed in judicial possession of the land granted.

On the 15th day of December, 1856, Pedro Jose Perea executed a deed of gift of the aforementioned land to Jose Leandro Perea, his son, the present claimant.

The 11th article of the decree of the 4th of January 1813, (vide Coleccion de los Decretos de las Cortes de Espana, by Mariano Galvan,) vests in the provincial deputation the authority to approve all grants to land made within their respective provinces which requisite is fully complied with in the case under consideration. The grant is also an absolute one, there being no conditions required from the grantee.

The oral testimony taken in the case shows the land to have been actually occupied by the grantee, whenever the Indians would allow it, for a period of twenty one years.

The documents acted upon by this office are the originals, with the exception of the petition and grant, which are "testimonios," or copies of the originals on file in this office, certified by the secretary of the territorial deputation.

The grant is, therefore, confirmed to Jose Leandro Perea, and transmitted to the proper department for the action of congress in the premises:

WM. PELHAM,
Surveyor General.

SANTA FE, NEW MEXICO, *September 15th*, 1857.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

71 (*d*) The Surveyor General of New Mexico made report of the proceedings in his office as aforesaid to the proper department for the action of Congress in the premises as provided by the law creating the office of Surveyor General of the Territory of New Mexico. This claim was numbered sixteen (16) on the records of the Surveyor General of New Mexico and by that number was

confirmed by the Act of Congress approved June 21st, 1860, which said Act so far as applicable to this cause is as follows, to-wit:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private Land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen be, and they are hereby, confirmed: Provided, That the claim number nine, in the name of John Scolly and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants."

"SEC. 4. And be it further enacted, That the foregoing confirmation shall duly be construed as quit-claims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

(e) In July 1871 the said Perea Grant was surveyed by the proper officers of the United States and this survey was on August 8th, 1871, duly approved, and on the — day of — 18—, a patent for the same was duly executed by the United States and afterwards delivered to the representatives of the patentee. This sur-
72 vey of the Perea Grant at the northeast and northwest corners thereof overlapped the survey of the Preston Beck Jr. Grant as hereinafter recited to the extent of about five thousand (5,000) acres.

6. The testimony shows, and this court finds that Pedro Jose Perea at the time, and prior to the action of the Territorial deputation in reference to the said Perea Grant, was occupying a tract of land south of the Pecos River, but the house in which he lived and the land which he was so occupying was not within the boundaries of the tract of land now in controversy; and that in 1836 said Pedro Jose Perea was occupying and using the land last aforesaid which was located south of the Pecos River. Since about the time of the issuance of the patent for the Perea Grant as aforesaid and until a short time before taking possession of the same by the Receiver in this cause, the intervenor herein and his grantors had at intervals made use of the overlap or tract of land in question for livestock purposes but such use was not continuous or exclusive.

About the year 1862, a trespasser entered upon a portion of the overlap in question and constructed a small stone house north of the Pecos river, which he occupied for two or three years. This house subsequently became dilapidated, but was afterwards repaired by another trespasser. The house was again abandoned, and for several years was not fit for occupation. In about the year 1887, the house was repaired by some representative of the then claimant of

the Perea Grant, and occupied for a short time. The house again became dilapidated and remained in such condition until as late as September 1896, when the same was caused to be repaired and occupied by a representative of the claimants of the Perea grant, until in the early part of June, 1903, for three years prior to June 1903, the Perea grant, including the overlap had been leased to F. A. Manzanares, who, during those years occupied said house, and
who, during that time, used the premises in question or some
73 portion thereof, for lambing purposes in the spring of each year, but during said time said Manzanares did not undertake to keep his animals within the boundaries of said Perea grant even during the lambing seasons, and did not maintain, during said period, exclusive possession of said overlap, with the exception of said house; and during said period, live stock belonging to the representatives of the owners of the Beck Grant, were gracing upon said overlap, as were also the live stock of other owners. Said house was located near the northern boundary of said overlap.

7. The title of the owners of the Preston Beck Jr. Grant, represented in this cause by Andrieus A. Jones, Receiver, in and to the land in controversy is founded upon a petition by Juan Esteban Pino to Bartolome Baca, the Acting Superior Political Chief of the Province of New Mexico, and President of the Most Excelcellent Provincial Deputation of said Territory; a document by Bartolome Baca transmitting said petition to said provincial deputation; the record of the proceedings of said provincial deputation upon said petition; the grant of land by said Bartolme Baca to Juan Estevan Pino, and the report of the juridical possession by Tomas Sena, Constitutional Justice, given to Juan Estaven Pino, all of which documents are in the Spanish Language and the originals thereof upon their execution were placed in the archives of the government of New Mexico and were there at the time of the ceding of New Mexico to the United States and are now on file and of record in the office of the Surveyor General of the Territory of New Mexico, and said records translated into the English Language are as follows, to-wit:

74 (*Translation.*)

Sir, Acting Superior Political Chief of This Province:

The citizen, Juan Esteban Pino, inhabitant and resident of this city of Santa Fe, capital of the same province of New Mexico, before your honor, with due respect, represents: That finding himself the owner of a considerable amount of stock, (vienes de campo) and having no proper and capable place in which to take care of it, with any security and method for its progressive advancement, and being indispensable for me to solicit the means that assist industry, to which I aspire, to sustain, with the decency and respect which I have always accustomed, a numerous family with which I am surrounded; in virtue of which I pray your honor, if you should so consider it just, to grant to me, in the name of the supreme govern-

ment of the Mexican nation, and with the title of grant, the
75 place of the Little Spring, (Ojito,) which is called Las Gallinas, which is on the road which goes to the one of Los Conchas, in the direction of east and south, asking for its boundaries the following points: on the north the landmarks of the farm of Don Antonio Ortiz, and the table land of the "Aguage de la Yagua; on the south the river Pecos; on the east the table land of Pagarito; and on the west the point of the table land of Las Chupaines, where I offer, provided your honor is pleased to grant said place in my favor, which will be styled "Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas," to possess with my aforesaid stock (vienes de campo) and open cultivation (labor) on the lands of said farm as the localities and water will allow. Your honor being pleased to elevate this my request to the most excellent provincial deputation of this territory, in order that in view of it, and with the advice of said corporation, your honor will provide what you may deem proper, wherefore, I request and pray your honor to do as I solicit, by which I will receive the grace I impetrate—costs, protests, and whatever is necessary.

JUAN ESTEVAN PINO. [RUB-IC.]

Santa Fe, the 6th day of December, 1823, 3d and 2d.

Bartolme Baca, acting superior political chief of the province of New Mexico and president of the most excellent provincial deputation of its territory, &c.

The present foregoing petition, (solicitud) on common paper, there being none of any seal in this province, being considered as presented and accepted, let it pass to the most excellent provincial deputation, in order that said honorable corporation be pleased to resolve what they may deem proper at the request of the party interested; praying its excellency that the one signing this decree makes the following remarks:

1. Its excellency does not ignore that the reduction of the public lands to private property is one of the steps that the good of the country and the encouragement of agriculture and industry
76 imperiously demand, and that it is an assistance to the industrious citizens who are not property holders.

2. It cannot be hidden from I. E. that in this province the decline in its agriculture and industry, particularly in the raising of black cattle and sheep, has been principally on account of the inveterate abuse of all the lands being public, on which account none is improved, and thus can be seen at one single glance, that when this prejudice ceases, horned cattle, sheep and horses will increase, the province will then depend on some means of resource which will at the same time stimulate the remaining citizens who are not indolent.

3. That the number of vagrants in this province being so great, and there being no public establishment of correction in any part of it, the result is that there being no place where the aggressors can be sent, for this reason crimes remain unpunished and the authorities insulted.

4. That the public lands, much more such as this party solicits, which are at a great distance from the settlements, being reduced to private property, a benefit would accrue to the public funds, a great resource to the authorities, and what is more, the extension of the great population at the expense of one single individual.

For the reasons given, and no injury resulting to any third party, I. E. may, if it sees proper according to the remarks which I h-ve made, bestow the grant which the party interested solicits, as in so doing I. E. will prove that they endeavor to remove the obstacles that are so diametrically opposed to the principal branches of the agriculture and industry of this province, which remain in a lethargic state for the only reason of the prejudices of its own inhabitants observing that the petitioner has sufficient stock to occupy the land he solicits.

BARTHOLOME BACA. [RUBIC.]

SANTA FE of the NEW MEXICO, *Dec.* 18, 1853.

I, the undersigned, secretary of the most excellent provincial deputation of this territory of the province of New Mexico, certify
77 that in the journal of the proceedings of said corporation, at page 75, number 70, on the other side of said leaf is to be found recorded the following paragraph: The President presented a petition from Don Juan Estevan Pino, containing the request that a piece of land sufficient capacity for raising black cattle, sheep and horses, be marked out, granted and registered (documented) to him; cultivating on the aforesaid land as the water and locality may allow, requesting to be allowed as boundaries of the aforesaid farm, which shall be styled the "Hacienda of San Juan Bautista del Ojito del Rio de las Gallinas," the following points: On the north the land marks of the farm of Don Antonio Ortiz, and the table-land of the Aguage de la Yegua; on the south, the Pecos river; on the east, the table-land of Pajarito; and on the west, the point of the table-land of the Chupaines. Being open for discussion, and several remarks being made by Don Antonio Ortiz and Don Pedro Garcia, it was resolved that, without and further delay, the land solicited by the aforesaid Don Juan Estevan Pino be granted to him, as the decline in the agriculture and industry of this province is occasioned in whole or in part by the prejudice existing against making grants on the public lands, and in order that said grant may not be wanting in any requisite, this deputacion resolved that, through his secretary the proofs of his proprietorship to said land be given to him, on which land Mr. Pino shall fix formal boundaries that will make known his own property, granting the same to him in the name of the supreme government of the Mexican nation, and as to a citizen who is in the full exercise of his rights, not being prevented from the want of any requisite which in his petition is not set forth, from being recognized as the legitimate owner of the land granted to him, observing that I. E. has considered said petition with the greatest deference.

The above is a true and legal copy of the original existing in this secretary's office, which is under my charge. Santa Fe, December

23d, one thousand, eight hundred and twenty-three, third of the independence and second of liberty.

[RUBIC.] JUN BAUTISTA VIGIL,
Secretary.

78 City of Santa Fe, capital of the province of New Mexico, on the twenty-third day of the month of December, one thousand, eight hundred and twenty-three, third of the independence and second of liberty, I, Don Bartolome Baca, acting superior political chief of this province, by virtue of the powers on me conferred and with which my predecessors have been vested, with the previous consent of the most excellent provincial deputation of this territory, I have granted, and by this patent do grant, in the name of the supreme government of the nation, to Don Juan Estevan Pino the land he solicits on the Gallinas river, which shall be called the "Hacienda of San Juan Bautista del Ojito del Rio de las Gallinas, recognizing as boundaries, on the north, the landmarks of Don Antonio Ortiz, and the table-land of the Aguage de la Yegua; on the south, the Pecos river; on the east, the table-land of Pagarito; on the west, the point of the table-lands of the Chupaines; on which fixed points he will place formal and well constructed boundaries, so that in all time to come the dividing line of the land granted to him may be known that according to the laws refferring to the matter, and which are now in force, of which may be hereafter in force, he may enjoy the same, himself and his lawful heirs, with the other provisions of the general laws; and being placed in possession in the manner accustomed, said proprietor may place such improvements on said land as he may deem proper—building houses, enclosures, and whatever may be necessary for the promotion of the enterprise he is about to establish. And by this procedure, I have so decreed, ordered and signed with my attending witnesses, in the absence of my secretary and of a national notary, of which class there are none within the limits of this province under my charge, and on this common paper, there being none of the stamped. Given in the aforesaid city, on the aforesaid day, month and year, to all which I certify.—Bartolme Baca; attending, Rafael Sarracino, attending, Santiago Abrew.

In the aforesaid town of Santa Fe, on the twenty-fourth day of the month of December, one thousand, eight hundred and
79 twenty-three, 3d and 2d, I, the aforesaid political chief, said: that by virtue of having bestowed on Don Juan Estevan Pino the grant of the farm the Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas, as appears by this patent, I ought to direct, and did direct, that these proceedings being recorded, a copy be furnished to the party interested, that it may be a proof in his favor at all times; and by this act I have so decreed, ordered and signed, with my attending witnesses, to which I certify. Bartolme Baca; attending, Jose Rafael Sarracino, Santiago Abrew. A copy of the original of which is deposited in the archives u-der my charge.

BARTOLME BACA. [RUBIC.]

SANTA FE, *December* 27, 1823.

In the new Hacienda of San Juan Bautista del Ojito del Rio de las Gallinas, on the twenty-ninth day of the month of August, of the present year 1825, I, Don Thomas Sena, constitutional justice (alcalde) of the corporation of the jurisdiction of San Miguel del Bado de Pecos, by virtue of this order communicated to me in a dispatch of Don Bartolme Beca, acting superior political chief of this territory of New Mexico, of the twentieth instant, which, in its original, precedes this proceeding and previous to the grant of land bestowed by the most excellent provincial deputation to Don Juan Estevan Pino, resident of the City of Santa Fe, whom I certify to be known to me. I certify and swear that the aforesaid documents, which accredited ipso facto that the aforesaid Don Juan Estevan Pino is the legitimate owner of the aforesaid farm of San Juan Bautista del Ojito del Rio de las Gallinas, were presented to me. In witness whereof, and in compliance with the provisions of the foregoing superior order, I have placed him in possession of the said Hacienda, pointing out with my attending witnesses the landmarks referred to in said grant, known in all the jurisdiction of my charge, the boundaries set forth in his petition and in the grant which was bestowed to him; declaring that, from this date,
80 the time for him to corroborate his claim, which the axiom proved in the laws of possession, &c., favors him with, will commence.

Given in the new farm of San Juan Batista del Ojito del Rio de las Gallinas, on said day, month and year, to which I certify, signing the present document, with my attending witnesses, in the absence of a national notary, there be none in all this territory, to which I would certify.

THOMAS SENA, [RUBIC.]
President Justice.

Attending:
JOSE MIGUEL PENA. [RUBIC.]
Before me,
JOSE MIGUEL SANCHEZ, [RUBIC.]
Clerk of Corporation.

81 8. On the 29th day of August 1825, Don Tomas Sena, Constitutional Justice by order of the political chief placed Juan Estevan Pino, in juridical possession of said tract of land and the said grantee occupied and used said tract of land as a live stock range from the time of being so put in possession thereof until his death about the year 1839 after which time his heirs continued to use and occupy the grant and in 1854 their title in and to said tract of land became vested in Preston Beck Jr.

9. On the tenth day of May 1855, Preston Beck Jr., filed his petition in the office of the Surveyor General of New Mexico setting forth his claim as owner of the grant of land above described and praying that the same might be confirmed. Alexander Hatch and others appeared and opposed the confirmation of the grant to Preston

Beck Jr. Testimony was taken in reference to the confirmation and the case was finally argued and submitted on the 13th of July, 1856, and prior to September 30th, 1856, the said Surveyor General rendered his decision upon said petition which said petition and decision are and are as follows, towit:

82 UNITED STATES OF AMERICA,
Territory of New Mexico, ss:

To the Surveyor Ge-eral of New Mexico:

Preston Beck, junior, a citizen of the United States, and resident of the Territory of New Mexico, respectfully represents to you, that he is a claimant and legal owner, in fee, of a certain tract of land lying and being situate in the county of San Miguel, in said Territory of New Mexico, and known as the "Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas," and bounded on the north by the landmarks of the sitio of Don Antonio Ortiz, and the
83 Mesa of the "Aguage de la Yegua"; on the south by the river Pecos; on the east by the Mesa of Pajarita; on the west by the point of the Mesa of the Chupaines; all of which points and boundaries are well known landmarks in the said county of San Miguel; and the said Preston Beck, the "present claimant," claims a perfect title to said land by virtue of a grant made on the twenty-third day of December, in the year one thousand eight hundred and twenty-three by Bartolme Baca, governor and political chief of the province of New Mexico, by and with the advice and approbation of the provincial deputation of the said province of New Mexico, to one Juan Estavan Pino, a citizen of Mexico; which said grant was made as aforesaid by authority of the laws, usages and customs of the republic of Mexico, in force at that time, and of the laws and regulations of Spain, which were declared and recognized to be in force and effect at the time in the republic of Mexico. For which power and authority see "Collection of the Decrees and Orders of the Cortes of Spain," which are considered in force in Mexico, published in Mexico by Martano Galvan, in 1829, page 56, and from pages 91 to 101. See also the decree of Mexico of June 4, and September 18, 1823, pages 123 and 180 of 2d vol. Galvan's Decrees. See Ordenanzas de Terras y Aguas, and 8 Peters' Reports 436; 15 Peters', 130; Howard, 24; 6 Peters, 691; Holcomb's United States Digest, 358 to 363.

The said Preston Beck, claimant, further states that he cannot show the quantity of land claimed by him, except as set forth in said grant, as within the above described well known metes and boundaries; nor can he furnish a plat of survey, as no survey has ever been executed. Claimant further states that one Alexander Hatch and about one hundred other persons have settled upon said grant without a title from any person, or from any government, and with the full knowledge of the existence of the claim now presented. Claimant further states that, by virtue of said grant, Juan Estevan Pino was lawfully put in possession of said tract of land by the com-

potent authorities, and settled upon said claim with a large amount of property, and there held possession of the same for the
84 space of twenty-one years, and until expelled by the hostilities of the savage Indian tribes; that upon the death of Juan Estevan Pino, the said tract of land was inherited by his two sons, Justo Pino and Manuel D. Pino, who were his only heirs, and the present claimant claims his title by virtue of deeds from Justo Pino and Gertrudis Rascon, his wife, and from Manuel D. Pino and Josefa Ortiz, his wife; all of the original grants and deeds of transfer and documentary titles, marked A, B, C, D, E, and herewith filed and made a part of this clam. Claimant files this his said claim before you, under the 8th section of the act of congress, approved 22d July, 1854, entitled, "An act to establish the offices of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes," and respectfully asks confirmation by you of his said claim.

PRESTON BECK, JR.,
By H. N. SMITH,
His Attorney.

SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *September* 30, 1856.

The foregoing is a true copy of the original on file in this office.

WILLIAM PELHAM,
Surveyor General.

PRESTON BECK, JR., Assignee of the Heirs of Juan Estevan Pino,
versus.
ALEXANDER HATCH and Others.

This case was filed in this office by Preston Beck, Jr., as present claimant, under a conveyance from the heirs of Juan Estevan Pino, and their wives, on the 10th day of May, 1855.

On the 6th day of December, 1823, Juan Estevan Pino, a citizen of this territory, petitioned Bartolme Baca, acting superior political chief of the province of New Mexico, for a grant of land in the county of San Miguel, to be known as the "Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas," with the following boundaries: on the north, the landmarks of the tract of Don Antonio Ortiz, and the table-lands of the Aguage de la Yegua; on the south, the Pecos river; on the east, the table lands of Pajarito; on the west, the point of the table land of the Chupaines.

85 This petition was transmitted by Bartolme Baca, acting superior political chief to the most excellent provincial deputation of New Mexico, on the 18th day of December, 1823, recommending the grant to be made to the petitioner, and, in compliance with the recommendation of the political chief, the provincial deputation of New Mexico did, on the 23d day of December, grant to Juan Estevan Pino, for himself and his legitimate heirs, the land asked for in the petition, with the boundaries therein set forth.

On the same day Bartolome Baca, acting superior political chief, issued his granting decree, in pursuance of the action taken by the provincial deputation in the premises, requiring the party to place permanent and fixed landmarks in his possession, in order that in all time to come the dividing line of his possession might be known.

On the 29th day of the month of August, 1825, the party was placed in possession of the land granted to him by Don Tomas Sena, constitutional justice (alcalde) of the corporation of the jurisdiction of San Miguel del Bado, with all the formalities required by law.

On the 15th day of July, 1848, Manuiel Doroteo Pino and Justo Pastor Pino, the legitimate heirs of Juan Estevan Pino, transferred all their right, title and interest in and to the above grant of land, to their wives, Dona Josefa Ortiz and Dona Gertrudis Rascon.

On the 18th day of June, 1853, Manuel Doroteo Pino and Josefa Ortiz, his wife, conveyed to Hugh N. Smith, trustee for Preston Beck, Jr., the one undivided half of said tract of land known as the "Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas," and on the 30th day of October, 1854, Justo Pastor Pino and Gertrudis Rascon, his wife, conveyed to Preston Beck, Jr., the remaining undivided one-half of said tract of land.

The present claimant alleges in his petition that one Alexander Hatch, and about one hundred other persons, have settled upon said grant without a title from any person, or from any government, and with a full knowledge of the existence of the grant filed by the claimant.

86 The above case was set for hearing on the 20th day of August, 1855, and the testimony presented by the claimant being taken, the counsel for the settlers closed their testimony and rested their case.

The case was argued by Mr. Hugh N. Smith and Mr. R. H. Tompkins for the claimant, and Mr. M. Ashurst for Alexander Hatch and others.

The following are the principal objections made by the counsel for Hatch, et al., against the confirmation of the grant:

1. The want of authority vested in the political chief of the Territory, Bartol-me Baca, to make a grant of land—the republic of Mexico having just severed itself from the sovereignty of the Spanish government and no permanent government being established, and all the laws of the Spanish government previously in force being annulled by the act of independence.

2. The indefiniteness of the grant, there being no landmarks established as required by law.

3. That Juan Estevan Pino, the grantee, had forfeited all right to the land granted to him, on account of its non-occupancy for the time required by law.

This case was argued very elaborately by the counsel on both sides, and many points concerning the boundaries of the grant were introduced in the testimony and the arguments, which this office deems unnecessary, at present, to notice, as they have no direct reference to the validity of the grant.

This case has been considered by this office with much attention; and it is understood that the validity of nearly all the private land claims in this territory depends upon the same principles, all the authorities that could be procured, having any bearing on the case, having been carefully examined and maturely deliberated.

The documents presented in this case are original, and the signatures of the granting officers and conveyors are proven by testimony to be genuine, and the chain of title from the original grantee to the present claimant is complete.

The government of Spain vested in the supreme officers of the ultermarine provinces under its sovereignty the right of separating from the public domain such portion of land as they deemed
87 proper for the promotion of agriculture, and the encouragement of stockraising, as will be seen by reference to the orders and decrees of the Spanish government, and the recopilation of the Indies.—(White's Recopilation.) When Mexico was separated from the sovereignty of Spain, and became a separate and independent government, in the year 1821, it was expressly declared that "all the authority necessary for the administration of justice, and other public acts, should emanate from the empire (Mexican) itself. It has seen proper to confirm and continue in office all the authorities for the present, and according to the plan of Iguala and the treaties of the city of Cordova, in order to legalize the exercise of their respective powers."—Galvan's Decrees, vol. 1.

The fifteenth article of the plan of Igaula declares that "all political, civil and military, and ecclesiastical officers, shall continue as they are, at the present day; those only shall be removed who do not subscribe to the plan," &c.—Galvan's Decrees, vol. 1, page 4.

The twelfth section of the treaty of Cordova also declares that "the provisional assembly shall be governed by the laws then in force, where they are not contrary to the plan of Iguala." Galvan's Decrees, vol. 1, page 7.

There was, therefore, no interregnum in the government and the plan of Iguala and the treaty of Cordova vested in the officers of the new government the same power and authority exercised by them under the sovereignty of Spain.

In the absence of the governor from the territory, it was customary for the oldest member of the provincial deputation to assume his duties, under the title of "Gefe Politico," as in the present case, and full power and authority vested in him to do and perform all the duties pertaining to the office of governor. In the present case, however, the grant was made by the provincial deputation, the supreme authority of the territory, and the granting decree of the political chief was but a fulfillment of the enactment of that body—of whose authority to dispose of the public domain there is no question.

88 The boundaries set forth in the granting decree are natural points well known to all the community; and in the absence of any survey, which was not required in the grant, are amply sufficient to designate such portion of land as was intended to be severed from the public domain.

The evidence presented by the claimant shows that the grantee did have possession of the land granted to him—that he occupied it with his stock, and cultivated certain portions of it, and that he continued to do so until he was driven off by the hostile Indians. Not having voluntarily abandoned the land, he did not, therefore, forfeit his right to the grant.

The intention of the provincial deputation and the recommendation of the governor, and no conditions being attached to it, makes the grant a positive and absolute one, and vests in the grantee a title in fee to all the land embraced within the boundaries set forth in the granting decree.

The objections made by counsel against the validity of the grant are therefore overruled.

Believing this to be one of the cases coming under the provisions of the treaty of Guadalupe Hidalgo of 1848, and having strong claims to validity under the decisions of the supreme court of the United States in similar cases, the grant made to Juan Estevan Pino to a certain tract of land in the county of San Miguel and known as the "Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas," and of which Preston Beck, jr., is the present claimant, is hereby approved; and the congress of the United States is respectfully recommended to cause a patent to be issued to the said Preston Beck, jr., by the proper department, and cause the same to be surveyed.

WILLIAM PELHAM,
Surveyor General of New Mexico.

SURVEYOR GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *September* 30, 1856.

The foregoing is a true copy of the original decision now on file in this office.

WILLIAM PELHAM,
Surveyor General of New Mexico.

89 10. The said Surveyor General on September 30th, 1856 made an annual report to the Secretary of the Interior and transmitted therewith for confirmation by Congress the claim of Preston Beck Jr., for said tract of land, which said claim was numbered one in the office of said Surveyor General.

11. The Congress of the United States by an Act approved by June 21st, 1860, confirmed said grant as recommended for confirmation by the Surveyor General, the same being referred to in said Act of Congress as Claim Number one; said Act of Congress is the same Act hereinbefore quoted, which confirmed private land claim number 16.

12. In September 1860, under the direction of the proper officers of the interior department of the United States, said Preston Beck Jr., Grant was surveyed, and such survey was on November 23rd, 1860 approved. On the 13th day of June 1883, a patent of the United States for said grant as thus surveyed was duly executed, recorded in the proper government records of the City of Washing-

ion, and forwarded to the Surveyor General of New Mexico, for delivery to the parties in interest upon payment of the costs of the survey. The costs of the survey have not yet been paid, and the patent remains in the office of the Surveyor General of New Mexico.

13. At the time of the institution of the suit in 1876 for a partition of the Preston Beck Jr. Grant, some parties to whom an undivided portion of the interest of Preston Beck Jr., had been conveyed, were using and occupying said grant as a live stock range and have continued so to do down to the present time, but such occupation prior to the appointment of the Receiver in this cause was not exclusive.

90 14. About the 20th day of June, 1903, the receiver herein, went upon said land and took actual possession of the same, the said house at that time being vacant and unoccupied, and no one being in actual, exclusive possession of said overlap. The receiver executed a lease to Hale I. Lutz for substantially all of the overlap east of the Esteros Arroyo, and the agents of the receiver, and the lessee, took actual and peaceable possession of said house and all of the overlap, causing that portion of the overlap so leased to be fenced and exclusively used for grazing purposes. Such occupation and use by the receiver, his representatives and lessee, was peaceable, without interference or molestation from anyone, and such peaceable possession and occupancy continued until on or about the 17th day of September 1903, when the said house was entered by Jose Albino Sena, as alleged in the petition of the receiver filed herein for an order directing the said Harrison to show cause why he should not be punished for contempt. Geo. W. Harrison did intervene with the possession of the receiver and his lessee, as alleged in said petition, but such was done after advice of counsel, and the said George W. Harrison believed to be in accordance therewith; and at the present time the intervenor, acting through its president, the said George W. Harrison, has enclosed and is now occupy-

91 ing that portion of the overlap which lies to the west of the Esteros Arroyo, and is also occupying the said house and that portion of the overlap to the east of the Esteros Arroyo, and outside of the fences of the lessee of the receiver. The portion of the overlap now enclosed by the intervenor was not so enclosed or exclusively used until after the receiver had taken general possession of the Beck grant and exclusive possession of that portion of the overlap leased as aforesaid, and such fencing was done while the agents of the receiver were residing upon the Beck grant and the lessee of the receiver was residing upon the overlap. In the year 1903, said George W. Harrison conveyed the Perea grant to The St. Louis Land & Cattle company, a corporation, incorporated under the laws of the territory of New Mexico, of which corporation the said George W. Harrison is the principal stockholder, director and president.

The St. Louis Land & Cattle company, intervenor herein, has all the title heretofore held by Jose Leandro Perea, or his representatives, in and to the Perea grant, and the other parties to this cause have all the title heretofore held by Preston Beck, Jr., or his representatives, in and to the Preston Beck grant, at least to the extent

of the overlap in question, and such title of the owners of the Preston Beck Jr., Grant is controlled and represented in this cause by A. A. Jones Receiver.

92 15. In the original bill of complaint filed in this cause on January 21st, 1879, Jose Leandro Perea, the predecessor in title of the intervenor, the St. Louis Land & Cattle company, was not made a party defendant in said cause by name, and was not made a defendant at all, unless under the description in said bill of complaint, as,—"And others, the unknown owners of the premises hereinafter described as unknown heirs of said Preston Beck, Jr."

16. Said intervenor was not a party-defendant in this suit by the intervening petition filed therein by A. A. Jones, under which he was appointed receiver of said grant, said intervening petition having been filed by said Jones on the — day of September 1903.

17. There is no evidence whatever, before the court that any order for publication of the pendency of said original cause was ever made, or that such notice was ever published.

93 18. The owner of the Perea grant, in whom title was vested at the time said suit was brought, in 1876, as hereinbefore found, was Jose Leandro Perea, a well known resident of the territory of New Mexico, and he continued to be the owner of said grant without having been made a party to said suit up to the time of his death.

19. It does not appear from the pleadings and evidence in said cause that any successor in title of the said Jose Leandro Perea, including the intervenor, the St. Luis Land and Cattle Company, was ever made a party to said suit by any pleadings filed therein, or brought into court by any process therein, or that any notice of any application for the appointment of any receiver was ever served upon them, or any of them, and the court finds that they were not made such parties and that no such notice were ever served upon them, or any of them, prior to the appointment of receiver in said cause.

20. That the only way the St. Louis Land and Cattle Company became a party to the record in said cause, except the allegations in the intervening petition above referred to of the said A. A. Jones, that the said The St. Louis Land and Cattle Company claimed some interest in the property in controversy in said suit, was the filing of the intervening petition by the said The St. Louis Land and Cattle Company, praying that the receiver be required to surrender possession of the part of the Perea grant in controversy in this cause to the said intervening petitioner.

JOHN R. McFIE,
Associate Justice & Judge of the First Judicial District, Acting for and in the Absence of Chief Justice William H. Pope.

94 And Afterwards, *on* towit, on the ninth day of January A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an appeal Bond of Supersedeas, which said appeal bond of Supersedeas was and is in the following words and figures towit:

In the Supreme Court of the Territory of New Mexico.

No. 609.

GEORGE W. STONEROAD et als., Plaintiffs,
vs.
WILLIAM P. BECK et als., Defendants.

In the Matter of the Intervention of the St. Louis Land and Cattle Company.

ST. LOUIS LAND & CATTLE COMPANY
vs.
ANDRIEUS A. JONES.

STATE OF NEW MEXICO,
County of San Miguel, ss:

Know all men by these presents: That we, Andrieus A. Jones, as principal, and H. W. Kelley and C. C. Robbins as sureties are held and firmly bound unto the St. Louis Land and Cattle Company in the just and full sum of Two Thousand ($2,000) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 9th day of January, A. D. 1912.

The condition of the foregoing obligation is such that whereas a final decree was entered in the above entitled cause on the 4th day of January A. D., 1912, adjudging among other things, that Andrieus A. Jones, Receiver in the above entitled cause has title to and is entitled to the possession of only an undivided
95 moiety of the lands within the survey of the Preston Beck, Jr. Grant which overlap or conflict with the Perea Grant according to the surveys of the said grant as made by the officers of the United States, said grants being known respectively as Private Land Claims Number One and Number Sixteen in the office of the Surveyor General of the Territory of New Mexico; and further adjudging that the St. Louis Land and Cattle Company has title to and is entitled to the possession of the other undivided moiety of said overlap or conflict, and further adjudging that the said Andrieus A. Jones, as Receiver, surrender possession of said undivided moiety of the said land to the said St. Louis Land & Cattle Company, and

Whereas, the said Andrieus A. Jones, receiver, has been allowed an appeal from the adjudication and decree aforesaid of the said Supreme Court of New Mexico to the Supreme Court of the United States, which said appeal is to operate as a supersedeas of said decree of said Supreme Court, and the said supreme court has fixed the sum of Two Thousand ($2,000) Dollars as the amount of bond

to be given by the said Andrieus A. Jones, Receiver and Appellant, for such appeal and supersedeas:

Now, therefore, if the said Andrieus A. Jones, Receiver, shall prosecute his said appeal with due diligence in the Supreme Court of the United States, and if the decision of the Supreme Court of New Mexico be affirmed, or the appeal aforesaid be dismissed, shall comply with the decree of the Supreme Court of New Mexico, and shall pay all damages and costs that may be adjudged against him in the said Supreme Court of the United States, on said appeal, then and in that event, this obligation to be null and void, otherwise to be and remain in full force and effect.

A. A. JONES. [SEAL.]
H. W. KELLEY. [SEAL.]
C. C. ROBBINS. [SEAL.]

96 STATE OF NEW MEXICO,
County of San Miguel, ss:

On this 9th day of January, A. D., 1912, before me the undersigned, a Notary Public in and for the above County, personally appeared Andrieus A. Jones, as principal, and H. W. Kelley and C. C. Robbins, as sureties, each for himself and not one for the other, acknowledged that he signed, sealed and executed the foregoing bond as his free act and deed. And each of said named sureties being first duly sworn, each for himself, deposes and says: That he is worth the sum of Two Thousand ($2,000) Dollars, in money and property situated in New Mexico and subject to execution therein over and above all his just debts and liabilities.

[SEAL.] CLARENCE IDEN,
Notary Public.

My Commission expires October 8th, 1913.

The above and foregoing bond is approved by me this 9th day of January, A. D., 1912.

JOHN R. McFIE,
Associate Justice of the Supreme Court of New Mexico.

And Afterwards, on towit, *on* the 24th day of January A. D., 1912, there was filed in the office of the clerk of the Supreme Court of the State of New Mexico, a Præcipe for record in the above entitled cause, which said Præcipe for record was and is in the following words and figures towit:

In the Supreme Court of the Territory of New Mexico.

No. 609.

GEORGE W. ATONEROAD et al.
vs.
WILLIAM P. BECK et al.

97 In the Matter of the Intervention of the St. Louis Land and Cattle Company.

THE ST. LOUIS LAND AND CATTLE CO., Intervenor and Appellant.
vs.
ANDRIEUS A. JONES, Receiver, Appellee.

Præcipe.

To the Clerk of the Supreme Court of New Mexico, Greeting:

You will please make the record in the above entitled cause for the purpose of having the said cause reviewed by the Supreme Court of the United States, which shall include the following documents, to-wit:

1. The original bill of complaint filed January 21st, 1876;
2. The legal notice and proof of publication;
3. The order of court appointing Andrieus A. Jones, Receiver of the Beck Grant;
4. The intervening petition of the St. Louis Land & Cattle Company;
5. A petition of Andrieus A. Jones, Receiver, for an order directing George W. Harrison to show cause why he should not be punished for contempt;
6. The order to show cause;
7. Answer of George W. Harrison to the order to show cause;
8. Answer of Andrieus A. Jones, Receiver, to the intervening petition of the St. Louis Land & Cattle Company;
9. The order of May 31st, 1904 overruling the motion that George W. Harrison be punished for contempt and directing the Receiver to return to the St. Louis Land *Land* Cattle Company the possession of the Perea Grant including the overlap;
10. The motion of Andrieus A. Jones, Receiver, for a modification of the order of May 31st, 1904;

98 11. The order of court dated the 1st day of July, 1904 among other things, ordering George W. Harrison not to interfere with the Receiver or his lease in the possession of certain portions of the land in controversy;

12. The order of court dated the 20th day of August, 1904 directing that the possession of the property remain in statu quo until the further order of the Court;

13. The order of the court dated the 17th day of November, 1904

granting the motion for a rehearing, and suspending the order of May 31st, 1904, and directing the taking of testimony;

14. The final decree of the district court;

15. Prayer for appeal and order granting same;

16. The appeal bond approved by the district court;

17. Citation and return of service;

18. Certificate to the transcript by the Clerk of the District Court;

19. All orders of record in the Supreme Court of New Mexico and the motion for appeal to the Supreme Court of the United States made in open court;

20. The assignment of errors in the Supreme Court of New Mexico;

21. Motion for rehearing in the Supreme Court of New Mexico, and order denying the same;

22. The affidavit of Andrieus A. Jones as to the value of the property in controversy in this cause;

23. The appeal bond filed by Andrieus A. Jones, in the Supreme Court of New Mexico;

24. The finding of facts by the Supreme Court of New Mexico;

25. This Præcipe;

99 26. The opinions of the Supreme Court of New Mexico.

ANDRIEUS A. JONES,
ALBERT T. ROGERS, JR.,
Attorneys for Andrieus A. Jones, Receiver.

We, the undersigned, Attorneys for the St. Louis Land & Cattle Company, Intervenor, hereby consent that the documents called for by the foregoing præcipe shall constitute the record upon which the said cause may be heard by the Supreme Court of the United States, and waive any other or further notice of said præcipe, and right to suggest additions to or omissions from the said record.

Done at Las Vegas, New Mexico this 23rd day of January A. D. 1912.

CHAS. A. SPIESS,
S. B. DAVIS, JR.,
Attorneys for St. Louis Land & Cattle Company, Intervenor.

And Heretofore, on towit, *on* the 3rd day of January A. D., 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court, was and is in the following words and figures towit:

100 In the Supreme Court of the Territory of New Mexico, January Term, A. D., 1911.

No. 1288.

GEORGE W. STONEROAD et al., Appellees,
vs.
WILLIAM P. BECK et als., Appellant.

Appeal from District Court, San Miguel County.

Opinion of the Court.

MECHEM, *J.*:

This is a suit originally commenced by certain claimants of interests in the Preston Beck Grant for the purpose of determining the title of the various persons claiming interest therein, and obtaining partition of it. In the year 1903, A. A. Jones, was appointed receiver of the grant and immediately entered into possession of a large portion of it.

The Preston Beck grant in the southeasterly portion, conflicts with the Perea Grant to the extent of several thousand acres. The receiver appointed in this suit took possession of the Preston Beck Grant, including that portion of it in conflict with the Perea Grant. Thereafter the St. Louis Land & Cattle Company, intervenor and appellant herein, claiming the ownership of this land as the holder of the title to the Perea Grant, applied to the District Court of San Miguel County, by which the receiver had been appointed, for an order directing the receiver to surrender possession to it of the land in conflict. The district court considered this petition for the order directing the receiver to surrender possession sufficient to give jurisdiction to decide whether the land in conflict belonged to the owners of the Preston Beck grant or to the St. Louis Land & Cattle Company as the owner of the Perea grant; took evidence as to the respective titles and finally decreed that the land in conflict belonged rightfully to the Beck grant and the receiver was entitled to the possession of it and the St. Louis Land & Cattle Company had no right, title or interest in or to any portion of it. From this decree the St.

101 Louis Land & Cattle Company had appealed to this court.

The question we are called upon to decide is as to the title of this tract of land in conflict between the two grants.

The Preston Beck grant and the Perea grant were both confirmed by the act of Congress of June 21, 1860, 12 Stat. at large, page 71.

The court below found that both the Preston and Perea grants were not only imperfect, but were void grants prior to the action taken by congress with reference to them, but it held that as the Beck Grant was first made, or attempted to be made, by certain officials of Mexico, the government of the United States in issuing a patent for the same, in effect declared that it was valid under the laws of Mexico, and, being an older grant, consequently had priority

over the Perea Grant. And further, that the claimants of the Beck grant had taken the first steps necessary to acquire title by applying to the surveyor general and securing his favorable report of the grant before the claimants of the Perea grant had done so and that the patent or Act of Congress related back to the date of the acts of the Surveyor General.

The situation of the parties may be thus stated. By virtue of the Act of Congress confirming their respective claims, each has a patent of equal standing as far as time is concerned and as their position as grantees of the government of the United States is concerned; both then have a conveyance to the same tract of land. By Sec. 4 of the Act of Confirmation it is provided "and it is further enacted that the foregoing confirmation shall only be considered as quit claims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whatsoever."

If either party has the better title to the land in controversy that title must be found on one which existed at the time of the Act of Confirmation.

102 The intervenor as the owner of the Perea grant claims an interest in the tract in controversy, by virtue of the act of Confirmation above referred to. The Appellee- as owners of the Preston Beck grant resist because as they say, those from whom they deraign their title at the time of the Act of Congress had rights adverse to the government in the tract in dis*b*ute, which were not affected by the act of Confirmation. In fact they depend not upon their rights as grantees of the United States but upon an antecedent title.

It is sufficient to establish its claim of title to an undivided interest at least of the overlap that the intervenor introduced, the act of Confirmation and patent issue thereunder. To avoid the apparent effect of this proof the appellees must accept the burden of establishing a perfect legal title or right independent of their title by the act of Confirmation.

Both parties here claim under patents of the same date. Our inquiry, in order to settle their respective rights to the land claimed by each, must extend to the character of the original grants from the Mexican government. Henshaw v. Bissell, 18 Wall, 266.

It is not claimed by the intervenor that the Perea grant was a valid grant. It was claimed by the appellee that the Preston Beck grant is a perfect grant prior to its confirmation by congress.

The Preston Beck Grant was made December 23, 1823 by Bartolome Baca the then political chief of New Mexico. The independence of Mexico dated from Feb. 24, 1821. On that date the Kingdom of Spain lost its jurisdiction over what is now Mexico and the sovereignty of the Mexican nation commenced. Thereafter the colonization law of the Emperor Iturbide was adopted, January 4, 1823 was in force only a short time having been suspended by the decree of April 11, 1823 and superceded by the law of August 1824. From this it will be seen that the Preston Beck grant, made on Dec. 27,

1823, was made during the suspension of the Iturbide colonization Law of January 4, 1823.

The question presented is whether or not the political chief of the Province of New Mexico had authority to make the Preston Beck Grant. Counsel for appellees contend that both by express action of the Mexican Government and legal presumption, it must be decided that the Beck grant was a perfect grant and made by legal authority. Both here and in the court below, as stated in the opinion, of the learned trial judge, no question was raised that the grant as
103 made would not have been valid if made by the same officer acting under the Spanish government. It is assumed by both parties to this action, as well assume, that under the government of Spain the Political Chief would have had the power to make grants of public lands.

It is contended by appellees that the Mexican government by certain acts hereafter discussed continued in office the officer- of Spain and continued them in the exercise of all the power and authority they may have had under the Spanish Government.

The acts referred to are certain portions of the plan of Iguala, the treaty of Cordova and an order of the provisional council dated, October 5, 1821.

In the case of Ely's Administrator v. United States, 171 U. S. 22-28, these various acts as far as pertinent here are thus stated:

"On February 24, 1821, a declaration of independence was made known on the form known as the plan of Iguala, and this declaration of independence was made good by the surrender of the Cirty of Mexico on September 27, 1821. The fifteen sections of this plan provided that, 'the junta will take care that all the revenues of departments of the state remain in without alteration whatever, and all the employés, political, ecclesiastical, civil and military will remain in the same state in which they exist today.'

"On August 24, 1821, what is known as the Treaty of Cordova was signed at that village by General Iturbide for Mexico, and Vic-roy O'Donoju for Spain, the latter however, having no previous authority from Spain, and this treaty was by Spain afterwards repudiated. This treaty provided that 'the provincial junta was to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortez shall form the constitution of the State.' Immediately after the surrender of the City of Mexico a provisional council or junta, consisting of thirty-six members, was ocreated under the plan of Iguala, which assumed the control of the government, and on October 5, 1821, this provisional council promulgated the following order (Reynolds p. 95):

"The sovereign provisional council of government of the Empire of Mexico considering that from the moment it solemnly declared its independence from Spain all authority for the exercise of the administration of justice and other public functions should
104 eminate from said empire, has seen fit to habilitate and confirm all authorities as they now are, in conformity with the

plan of Iguala and the treaty of the village of Cordova, for the purpose of legalizing the exercise of their respective functions."

Conceding that by these acts the political chief of the province of New Mexico was continued in the exercise of his public functions, can it be said that they continued such officer in the exercise of the power he derived from the King of Spain to alienate the public domain?

These acts above referred to were necessary to secure a continuation of orderly government and prevent a condition of anarchy, and if there is nothing in them to declare a broader purpose they should not be construed to effectuate a purpose beyond that which satisfied their language.

It would not be contended for a moment that the new sovereignty intended to continue in force any law which did not recognize it, any law at variance with its paramount power and authority. On the other hand it is equally clear that it was its intention that all the laws in force in Mexico at the date of the extinguishment of the sovereignty of Spain, should remain in force, except so far as they affected the political institutions of New Mexican government.

This same reusult is effected by the "doctrine—that the laws of concuored or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him." More v. Steinbach, 127 U. S. 70-81.

It is not to be questioned that in an inquiry in which it was important to determine what was the law of descent and distribution for instance, in Mexico immediately after its independence and there being no new law promulgated by Mexican Authority, in that event the law in force in Mexico previous to its independence would control.

The change of sovereignty affected by the overthrow of Spain and the establishment of the Mexican nation was much the same as the change of sovereignty affected by the cession of New Mexico to the United States. In the case of Leitensdorf et al., v. Webb, 20 How. 176 The Supreme Court commenting on the results of such change said; "By this substitution of a new supremacy, although the former political relations of the inhabitants were dis-
105 solved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the constitution and laws of the United States, or with any regulations which the conquoring or occupying power should ordain.

Amongst the consequences which would be ordinarily incident to the change of sovereignty, would be the appointment and control of the agents by whom and the modes in which the government of the occupant should be administered—the result being indispensable, in order to secure those objects for which such a government is usually established.

"This is the principle of the law of nations, as expounded by the highest authorities."

The plan of Iguala and the other acts of the Mexican nation referred to were intended to accomplish two things, first, recognize and affirm the principle of the law of nations that the municipal and commercial laws of that country in force under Spanish rule should remain in force to the extent that they were compatible with the existence of the new sovereignty; and second, as a consequence incident to a change of sovereignty to appoint and control every public officer, so that "all authority for the exercise of the administration of justice and other public functions should emanate" from the new sovereign. Upon the cession of New Mexico to the United States all the laws of Mexico relating to subjects non-political in their character remained in force but they were administered by officers appointed and controlled by the United States. Likewise, in Mexico, after the independence of that country by the plan of Iguala and the other acts referred to the laws of Spain in force at that time of a non-political character were continued and remained in force and the officers of Spain having in charge the enforcement of those laws were made the officers of the Mexican nation.

It cannot be supposed that the statesmen of Mexico were ignorant of the principles of the law of nations, a subject of grant antiquity and of world wide application. It is to be presumed on the contrary that in erecting a new nation by which the previous political
106 relations of the people of that country were dissolved, they would regard as eminently necessary that the relations of the people to each other and their rights of property should remain undisturbed, and further that until a more perfect government should be ordained, the governmental machinery then in existence should be continued in action for the time being. It is indicative of this purpose that the junta or council is termed "provisional," that the treaty of Cordova provided that "the provisional junta was to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortez shall form a constitution of the state."

The act of Habilitation above referred to was adopted by the provisional council on October 5, 1821 in conformity with the treaty of Cordova and the plan of Iguala. The provisional council or junta remained in power until the assembling on February 24, 1822 of the Congress, elected under the provisions of the plan of Iguala and the treaty of Cordova, for the purpose of framing a constitution (Raynolds p. 31.)

From the foregoing it is very evident that the government of Mexico during this period was temporary and provisional in character. That it, while holding in its hands the supreme power perhaps, yet it was only clothed with the power by necessity until, as was contemplated and was afterwards done, a constitution might be adopted. In such a case it would seem that the temporary government had power only to preserve order, to maintain a condition of political non-action until the new sovereignty should be manifested through the at that time well recognized forms of constitutional

government. It would seem, therefore, that a proper construction of the various acts relied upon by appellees must be construed in the light of these conditions and should not be given a construction to include matters and things certainly not within their exact letter nor within their spirit.

It is significant that of the ten grants made in New Mexico between the date of Mexican independence and the law of
107 August 18, 1824, of which we have any records, four including the Preston Beck Grant were confirmed by Acts of Congress and the remainder were rejected by the Court of Private Land claims.

"The grants confirmed by Congress: Are; Ojito del Rio Gallinas date of grant, Dec. 23, 1823; confirmed by Congress June 21, 1860. Casa Colorado, date of Grant Sept. 15, 1823; confirmed by Congress Dec. 22, 1858. Brazito Grant, date of grant, 1822 or 1823; confirmed by Congress June 21, 1860. Anton Chico Grant, date of grant Feb. 13 1822, confirmed by Congress June 21, 1860. As shown by the docket of the Court of Private Land Claims the following claims were presented at the court for confirmation and rejected. The decrees of that court are not accessible:

No. 59. Juan Gid or John Heath Grant (Dona Ana County 108,000 acres) date of grant Dec. 27, 1822. Decree rejecting claim filed June 26, 1895 Court of Private Land Claims.

No. 142, No. 204, No. 206. Vallecito de Lobato Grant, dated Feb. 23 1824. Rio Arriba County, 114,400 acres. Claim rejected and petition dismissed Oct. 5, 1897 by Court of Private Land Claims. Feb. 4, 1898 appealed and allowed.

No. 174. Jose Ignacio Martinez Grant. Taos County, 500 acres. Grant dated October 30, 1821. Dismissed and grant rejected Jan. 31, 1898. Court of Private Land claims.

No. 175. Felipe Medina Grant. Taos county 300 acres. Dated July 24, 1823. Petition dismissed and grant rejected Jan. 1898 by Court of Private Land claims.

No. 176. Manuel Fernandez Grant Taos County. Dated Dec. 20, 1823. Petition dismissed and grant rejected Jan. 31, 1898 by Court of Private Land claims.

No. 241. Paraje del Rancho grant. Taos county 90,000 acres, Dated Dec. 27, 1821. Petition dismissed May 17, 1897 by Court of Private Land claims.

108 In the case of Leese v. Clark, 3 Cal. 16-23 the court said:

"Prior to the Mexican revolution which produced the Plan of Iguala, February 24, 1821, the unappropriated lands in this country constituted a part of the domain of the Spanish Monarchs, who alone represented and exercised the sovereignty of the Spanish nation. The royal governors were the mere deputies of the king, and exercised the sovereignty in his name.

His will, manifested in the form prescribed by his regulations, operated as a valid alienation of the public domain. His governors, acting under his authority, and in his name, were the mere executors of his will—whence the law or decrees of the kings, and the regulations and usages of their governors, sanctioned by royal ap-

proval or acquiescence, afforded the proper tests by which to determine the validity of grants of land belonging to the nation whose sovereignty those kings represented and exercised, and they are accordingly consulted and relied upon by the courts of the United States in adjudicating Spanish claims in Florida and Louisiana. But on the 24th of February, 1821, the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico, except by an act of Mexican sorvereignty. The royal decrees, regulations and usages, ceased to have any effect whatever as to subsequent grants of land.

This point was determined by the Mexican Congress, in a case which arose shortly after the independence of that government, and has ever since been acquiesced in. On the 17th day of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas. On the 19th of August, the Mexican Governor of that province (Martinez), assuming the powers properly exercised by the royal governors, modified the grant in favor of the younger Austin.

Had the royal laws and usages still continued to retain their force, the acts of Martinez would have been valid, but the Mexican government, at the same time recognized the act of the royal
109 governor as valid, because done before the change of sorvereignty, refused to confirm the act of its own governor, done after the change on the ground that the sovereignty could be exercised only by the Mexican nation. The subject attracted public attention, and the Mexican government were about passing a general law in relation to the alienation of public lands, when Iturbide forcibly dispersed the members of that body, and caused himself to be proclaimed emperor.

On the 4th of January, 1823, he promulgated a general law on the subject, but being shortly afterwards disposed, Congress, on the 11th of April, 1823, suspended that law. On the 18th of August, 1824 Congress enacted a general colonization law, prescribing the mode of granting public lands through the Mexican territory. (White's Recap. 561, 8, 71, 76 and 82.)

Stephen F. Austin alluded to in the case just cited as the "younger Austin" on Nov. 1, 1829, addressed to the "settlers in what is called "Austin's colony" in Texas "on account of his negotiation with the Mexican government, in which he says that at the time of his arrival in the city of Mexico on the 29th day of April, 1822" the national Congress had been in session since the 24th of February of that year. The form of government as then established was a limited monarchy, in conformity with the plan of Iguala and treaty of Cordova, and the Spanish construction was provisionally adopted. The executive department was administered by a regency, of which the Generaliss-o Don Agustin Iturbide, was President." After describing the unsettled conditions then existing he continues "on examination into the state of this colonization business, he (Austin) found that the regency had decided that the Governor of Texas, Martinez, was not sufficiently authorized to stipulate what quantity

of land the new settlers were to get, as he did by his letter to Austin, of the 19th of August, 1821, and that this point must be settled by a law of Congress, for which purpose all documents relative to said new settlement were transmitted by the regency to Congress.

110 T-ere seems to have been no doubt of the validity of the grant to Moses Austin, a Spanish subject, made under the Spanish Government, but the regency and the congress of Mexico decided that that power of the governor was abrogated by overthrow of Spanish rule. It was an interpretation of the Plan of Iguala, treaty of Cordova and order of October 5, 1821 by the supreme power of Mexico and furnishes us the best means of construction. U. S. v. Sherbeck, 27 Fed. Cas. 16275.

Moreover the language of these acts, the conditions of the country in which they were promulgated all bear so close an analogy to the principle of the law of nations respecting the laws of conquered or ceded countries as to warrant us in saying that each were their manifest intent and effect.

If this be so the case of More v. Steinbach 127 U. S. 70-'8; in which the court said:

"The doctrine invoked by the defendants, that the laws of a conquored or ceded country, except so far as they may effect the political institutions of the new sovereign, remain in force after the conquest of cession until changed by him, does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portion of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject," is in point and decisive and we so apply it.

In the case of Ely's administrator v. U. S. supra relied upon by Appellee in this connection does not hold that the validity of the sale in that case depended solely on the power of the officer to make it. On the contrary it is quite evident from a reading of that case, that, had the validity of the sale depended solely on the power of the officer to make it, the court would have held it invalid.

Moreover, the decision in Ely's Administrator case was

111 upon facts and under laws bearing no analogy to the case at bar. In that portion of Mexico where the land involved in the Ely's Administrator's case was situated public lands were sold by Incendants of the Royal Treasury. We know of no law of Spain providing for the sale of land in the Province of New Mexico and the lands in New Mexico which during those times became the subject of private ownership became so by grants, either as rewards to officials, or to settlers to encourage industry and the occupation of the country. In that case the land was sold. In this case the land was a gratuitous grant. In that case the purchase price of the land was received by and retained by the Mexican government and afterwards the sale was ratified and confirmed by a Mexican official whose power and authority to bind the Mexican government the court held to be undoubted; in this case nothing further was done by any Mexican official to confirm and ratify the act of the Political Chief.

Speaking of the subsequent action of the Mexican official who confirmed the sale in Ely's case and of the extent of his powers, the court said:

"When an office is created with such large powers as those and the incumbent thereof reviewing proceedings heretofore had by prior representatives of the government, and finding that a sale made by one of such prior officers has resulted in the payment of the cash preceedings thereof into the public treasury, confirms his action, ratifies his proceedings and issues appropriate title papers therefor, it would seem that any doubts which might hang over the power of the prior officer were put at rest, and that thereafter no question could be raised as to the validity of the sale." Ely's Administrator v. United States, supra p. 233.

Counsel for appellees contend that the fact that the officers of the Mexican government continued to make disposition of the public domain in accordance with the laws of Spain raises a legal presumption in the case at bar that authority to make this grant existed.

112 As sustaining their position on this point counsel cite the cases of United States v. Peralta 19 How. 347, United States v. Arredondo 6 Pet., 691.

In the case of Florida v. Furman 180 U. S. 402, a suit brought by claimants of a Spanish land grant to remove as clouds from their title, patents issued by the United States to land embraced within the land grant, the court speaking of the Arredondo and Peralta cases said:

"* * * it was held in view of the rules of decisions prescribed by the statutes under which the courts exercised jurisdiction, that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the official executing the grant, but that the court would assume as a settled principle that a public grant was to be taken as evidence that it was issued by lawful authority," and that

"In Crespin v. United States 168, U. S. 208, which was a case under the act of 1891, it was held that the presumption indulged in United States v. Arredondo could not supply the want of power in the alleged granting officer.

In the case at bar, as we have said, complainants were not proceeding under any act of Congress permitting the United States to be sued. but as at common law, and on the basis of absolute legal title. That title they were obliged to make out and could only avail themselves of such presumptions as would ordinarily obtain."

In the case at bar the appellees seek to bring themselves within the reservations of the act of confirmation. Their position is that at the time Congress confirmed the Perea Grant that the United States had no title to convey. To establish this fact they must prove a perfect title, and to do that show affirmatively that the officer making the grant had power to make it.

The Preston Beck and Perea grants being both void grants owe their validity entirely to the act of congress confirming them. Before their confirmation neither had any title or right to the land embraced within their boundaries, so that the act of confirmation

cannot relate back at least to the date of the acts of the
113 Mexican Political Chief by which he attempted to make the grants. This point is clearly settled in Dent v. Emmeger, 14 Wall. 308-312 in which the court said:

"Titles which were perfect before the cession of the Territory to the United States, continued so afterwards, and were in no wise affected by the change of sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. But inchoate rights such as those of Cerrex were of imperfect obligations and affected only the conscience of the new sovereign. They were not of such a nature (until the sovereign gave them a validity and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by congress they became American titles, and took their legal validity wholly from the act of confirmation and not from any French of Spanish element which entered into their previous existence. The doctrine of senior or junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to date of the origin of their respective claims or the circumstances attending it. Such is the settled course of adjudication both by this court and the Supreme Court of Missouri."

The court below held that the Preston Beck Grant had priority over the Perea Grant because the claimants of the former grant were first to apply to the surveyor general of New Mexico and secure his confirmation of their claim and "if the confirmatory act and subsequent patent operated as a deed to convey title from the United States to the confirmee, they would relate back to the incep-
114 tion of the proceedings necessary in order to obtain them, which in this case was the filing of the petition before the Surveyor General.

In the cases cited by counsel for the appellees, the patents or grants related back to the inception of the right to the patent. In other words, before the patents issued it had been determined by some intermediary tribunal that the claimant was entitled to a patent, or where the claimant by virtue of settlement and complying with the law became entitled to a patent. In all these cases the claimants before receiving patents had title. The patent followed as a matter of course. Before it issued the equitable title was in the claimant, the government holding the legal title for his benefit. In this case the action of the Surveyor General amounted to nothing at all. Between his report and the action of Congress the claimant had no right or title. In the case of Pinkerton v. Ledoux 129 U. S. 346-351 the court said: "The Surveyor General's report is no evidence of title or right to possession. His duties were prescribed by the act of July, 22, 1854, before referred to and consisted merely in making inquiries and reporting to Congress for action. If congress

confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress, it had no effect to establish such boundaries, or anything else subservient to the title."

The act did not even provide for applications to the Surveyor General. It was his duty "under the instructions of the Interior Department to ascertain the origin, nature, character and extent of all claims to land under the laws usages and customs of Spain and Mexico." His instruction- from the Secretary of the Interior were:

115 "You will commence your session by giving proper notice of the same in a newspaper of the largest circulation in the English and Spanish languages, and will make known your re-diness to receive notices and testimony in support of the land claims of individuals derived before the change of government. You will require claimants in every case, and give public notice to that effect, to file a written notice setting forth the name of "present claimant," name of "original claimant," nature of claim, whether inchoate or perfect, its date, from what authority the original title was derived, with a reference to the evidence of the power and authority under which the granting officer may have acted, quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim and to show a transfer of right from the "original grantee" to "present claimant."

But this order was not effective to give rights which the law did not give. That the powers of the Surveyor General of New Mexico and the board of Commissioners of California, were so dissimilar that the case of Beard v. Federy 3 Wall. 478 is not in point here is readily seen from the following statement from the case:

"After our conquest of California, in 1846, Congress, by Act of 3rd March, 1851, 'to ascertain and settle the private land claims' in that state constituted a board of commissioners, in the nature of a judicial body, before which, claims to land there were to be investigated. Every person claiming lands there 'by virtue of any right or title derived from the Spanish or Mexican Governments' was to present his claim to this board with the documentary and other evidences of it: Notices of depositions, when taken, were to be given to the law officers of the United States. In case of confirmation of the claim, an appeal was given the United States to the District Court; in which case, says the act (Par. 10), that court shall proceed to render judgment upon the pleadings and evidence in the

116 case, and upon such further evidence as may be taken by order of the said court. If the decree in that court was adverse to the government, an appeal was given to this court. The act declares that 'for all claims finally confirmed by the said commissioners or by the District Court, or by the Supreme Court, a patent shall issue to the claimant,'—but that such patent shall be 'conclusive between the United States and the said claimants only, and shall not affect the interests of thirs persons.' It declared moreover 'that all lands, the claims to which shall not have been pre-

sented to the said commissioners within two years after the date of the act, shall be deemed, held, and considered as part of the public domain of the United States."

Speaking of the effect of a decision by the Board, the court said: "The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

There can be no doubt but that it is the law that "the right to a patent once vested is treated by the government, when dealing with public lands, as equivalent to a patent issued. When in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening rights." Stark v. Starrs 6 Wall. 402-418.

This rule can have no application to the case at bar because it cannot be said that either upon the application to the Surveyor General or upon his favorable report upon the application, did a right to patent vest.

In the case of Hussman v. Durham, 165 U. S. 144-145 the court in discussing the doctrine of relation says: "A title by rela-
117 tion extends no further backwards than to the inception of the equitable right." In this case the claimants of the Preston Beck grant had no equitable right or title previous to the act of confirmation. This being so the act of confirmation should not as to the Preston Beck Grant be given effect by relation as of an earlier date, so as to take priority over the Perea Grant. Both are equal in time.

The intervenor and appellees holding by the same act of Congress in so far as their grants conflict or overlap, have each an "equal undivided moiety of the lands within the conflict." Southern Pacific Railroad v. United States, 183 U. S. 519.

For the reasons given the Judgment of the lower court will be reversed and the cause remanded for further proceedings in accordance with this opinion and it is so ordered.

MERRITT C. MECHEM,
Associate Justice.

We Concur:

WILLIAM H. POPE, *C. J.*
JOHN R. McFIE, *A. J.*
IRA A. ABBOTT, *A. J.*
FRANK W. PARKER, *A. J.*

Justices Wright and Roberts not having been on the bench, when this cause was submitted did not participate in this opinion.

118 And Afterwards, on towit, on the 4th day of January A. D. 1912, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a Per Curiam opinion in the above entitled cause on motion for rehearing, which said Per Curiam Opinion was and is in the following words and figures towit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1912.

No. 1288.

GEO. W. STONEROAD et al., Appellees,
vs.
WM. P. BECK et al., THE ST. LOUIS LAND & CATTLE CO., Intervenor, Appellants.

Opinion on Motion for Rehearing.

Per Curiam:

In deference to the importance of this case we have heard orally upon the motion for rehearing, thus waiving our rule, which precludes, except by special consent, oral argument upon such matters.

The motion proceeds upon two general grounds, first that the court, in its opinion, has overlooked certain contentions which counsel have presented in their briefs, and second, that certain positions there advanced are incorrectly decided by the court and that the opinion in these respects is contrary to controlling authority. The court has considered the case from each viewpoint. We adhere to the position quite fully outlined in the original opinion, that each of the conflicting Mexican grants was made without authority of law. The question which has, however, chiefly concerned us upon this motion, is whether, even if the grants were originally made without authority, there were other considerations operating in favor of the Beck Grant entitling it to priority over the Perea Grant. This is
119 to be considered from two standpoints, matters before and matters after the treaty. First, did there exist at the date of the treaty, by reason of what occurred under the former government, such elements of superiority in the Beck grant, viewed even as an invalid grant, as justifies our considering it prior in right here? It is urged, in this connection that the giving of juridical possession in 1825 lent the Beck grant a feature of superiority since in the Perea grant no juridical possession was conferred. We are of opinion, however, that this mere fact would not constitute a circumstance giving priority. If, as we have held, the original action of the granting authorities was invalid because not characterized by the power to pass the title, much more so is the act of an Alcalde viewed as an attempt to the same end. The Alcalde of course had no power to initiate a grant on behalf of the sovereignty (Hays v. United States, 175 U. S. 248). We think it is equally clear that if he gave possession pursuant to a void grant, no more dignity could flow from this latter circumstance than from a situation in which he attempted to give possession upon his own initiative and upon his own claim of power.

It is next argued, and with great force, that discarding the matter of juridical possession as an element of title, and discarding the acts of the granting authorities as efficacious to pass title, still, under

the case of Pino v. Hatch, 1 N. M., 125, 130, citing Pollard's Lessees, v. Files, 2 How., 5913, the acts of the granting officers invested the grantees with at least the right of possession for such time as the sovereign might permit them to stay there, in other words, a permissive possession tantamount to a license to occupy. It is said that as this existed in behalf of the Beck grantees, it constituted a feature of advantage and superiority which that grant possessed at the time of the treaty. We note, however, that the petition for the Perea grant, made after the Beck grant, recites possession and upon that an order favorable to the petition was made by authorities claim-
120 ing to have power to pass title, so that if we are to impute a permissive possession from the Beck Grant, we must likewise impute a permissive possession from the Perea grant. We recognize however, as between these two, the difference that in the Beck grant there was juridical possession and in the Perea Grant there was not. However, we think that if this doctrine is to be invoked, there is much to be said in support of the view that it operates in favor of the Perea grantees, as well as the Beck grantees. We, however, are of the opinion that, irrespective of this, the most that can be said in behalf of the Beck grant, under Pino v. Hatch, is that when the treaty came to be signed there was a license to occupy in favor of the Beck grantees. We do not commit ourselves to that position, but we say that the most that can be claimed under Pino v. Hatch is that that existed. Now, if that did exist, we are of opinion that under the case of Zia v. United States, 168 U. S. 198, this license or permissive possession was revoked ipso facto by the treaty and that when the treaty was signed these properties passed to the United States as public domain to be dealt with by Congress and that Congress did deal with them on the same day by the same Act, granting the premises here involved to two distinct parties represented by the two interests now before the court. It is not said, however, that these were circumstances subsequent to the treaty which create a superiority in favor of the Beck grant. We have, in the original opinion, dealt with the contention that the filing of the Beck petition first before the Surveyor-General created an elment of superiority. We have held that it did not and that the doctrine of relation had no application. We adhere to that view. The Act of 1854, which authorized the presentation of these petitions to the Surveyor-General, placed no time limit thereon. It invited all parties to come and present them for the consideration of the Surveyor-General, to be transmitted by him to Congress for its action. We think, therefore, that to hold that the mere circumstance that one claimant reached the Surveyor-General's office first in order to present his claim
121 cannot be considered as affecting the rights of other parties, who, perhaps, equally diligent, but farther removed geographically, may have presented theirs the next day, or the next week. Such a rule as is here insisted upon, in our judgment, would have meant that a petitioner living in Santa Fe and filing his claim immediately would have rights superior by that very fact to a claimant filing his claim seasonably, although later. We do not think that result can exist and this is illustrative of where counsel's con-

tention would lead us under the system created by the act of 1854. We have, however, considered this in the original opinion.

The other point urged, and one which it is insisted we have overlooked in the opinion, is that the survey of the Beck grant was first made and that it operated as such a segregation of the land from the public domain as made any attempt to survey it under the Perea Grant futile, and that the circumstances that the survey was first made of the Beck grant this gave that an element of superiority. We are unable to accede to that view. We think the time when a survey would be made was so much a matter in the hands of the executive or administrative officers that the mere fact that a contract may have been first let for the Beck grant, due perhaps to inherent difficulties in the survey of the other, or other purely accidental circumstances, could not operate to render nugatory an act of Congress which confirmed equally to the Perea grant and to the Beck grant the interests of the government in the lands involved. Upon consideration, therefore, of this second matter, we do not find any circumstance which leads us to adjudged the Beck grant superior in point of time. Our judgment, therefore, on this motion is that the original opinion must be adhered to and that will be the order of the court.

This view of the law being conclusive of the cause and it being stipulated by counsel that there shall be a final judgment in this court pursuant to the court's opinion, rather than a remanding of the cause to the trial court, the Clerk will enter a judgment
122 in this court declaring the rights of the respective parties to be the ownership of an undivided moiety in the overlap between the Beck and Perea grants. Counsel may prepare a judgment in accordance herewith.

WIILIAM H. POPE,
Chief Justice.

STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the above and foregoing is a full, true and correct copy of the record and proceedings, pleadings and opinions in the above entitled cause, which is hereby transmitted to the Supreme Court of the United States in accordance with an appeal heretofore granted by the Supreme Court of the Territory of New Mexico.

Witness my hand and the seal of the Supreme Court of the State of New Mexico, this the 29th day of January A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

123 In the Supreme Court of the United States.

GEORGE W. STONEROAD et al.,
vs.
WILLIAM P. BECK et al.

In the Matter of the Intervention of the St. Louis Land and Cattle Company.

ST. LOUIS LAND AND CATTLE COMPANY, Intervenor and Appellee,
vs.
ANDRIEUS A. JONES, Receiver, Appellant.

Appeal from the Supreme Court of New Mexico.

Assignment of Errors.

Now on this 22nd day of January, A. D. 1912, came the said Andrieus A. Jones, Receiver, by his attorney, and says that in the record and proceedings in the cause lately pending in the supreme court of the Territory of New Mexico wherein the said The St. Louis Land and Cattle Company was Intervenor and Appellant and the said Andrieus A. Jones, Receiver, was the Appellee, there is manifest error in this, to-wit:

1. That the said Supreme Court of New Mexico, as appears by its opinion in said cause, in substance, held and decided that the political chief of New Mexico, in December, A. D. 1823 had no legal authority under the laws then existing, to make grants of land in New Mexico, by and with the advice and consent of the territorial deputation, and that the grant of land as purported to have
124 been made to Juan Esteban Pino as appears by the granting papers constituting a part of the record in this cause, was invalid for want of legal authority.

2. The said Supreme Court of New Mexico, as by its opinion in said cause appears, in substance, held and decided that the grant of land to Juan Esteban Pino made by the Political Chief of New Mexico in December 1823, by and with the consent of the Territorial Deputation of New Mexico, the juridical possession of the grant given in 1825, and the fact that the granting papers and official report of juridical possession remained on file in the archives of New Mexico during the time that New Mexico remained a part of Mexico, did not constitute a ratification by the government of Mexico of the Acts of the officials in making said grant and giving possession thereof.

3. The Supreme Court of New Mexico failed to find and decide that the grant purporting to have been made to Juan Esteban Pino, as shown by the record, was a legal and valid grant under the laws of Mexico.

4. The Supreme Court of New Mexico failed to find and decide that the claimant of the Preston Beck Jr. Grant had a better title

under the laws of Mexico to the land in controversy than the claimant of the Perea Grant.

5. The Supreme Court of New Mexico failed to find and decide that the confirmation of the Preston Beck Jr. Grant by the Congress of the United States was legally prior to the confirmation of the Perea Grant.

6. The Supreme Court of New Mexico failed to find and decide that the confirmation by Congress, by the Act of June 21st 1860, related back to and took effect as of the date when Preston Beck Jr. filed his petition with the Surveyor General of New Mexico,
125 asking a confirmation of the Preston Beck Jr. Grant.

7. The Supreme Court of New Mexico failed to find and decide that the filing of the petition by Preston Beck Jr. with the Surveyor General of New Mexico, the confirmation by Congress of June 21st 1860, and the survey made in 1860 and approved on November 23rd of that year gave to Preston Beck Jr. a better title to the land in controversy than that attempted to be given to the claimant of the Perea Grant by the Act of Confirmation and the subsequent survey of the Perea Grant.

8. The Supreme Court of New Mexico failed to properly apply the Doctrine of Relation to the proceedings before the Surveyor General, the confirmation by Congress, the approved survey of the Preston Beck Jr. Grant, and thus give to the claimants of the Preston Beck Jr. Grant a better title to the land in controversy than the claimant of the Perea Grant.

9. That the said Supreme Court of New Mexico, by its opinion in said cause appears, in substance, held and decided that neither of the claimants to the land in controversy had a better title to said land than the other, either under the laws of and proceedings under the Government of Mexico, or the laws of and the proceedings under the Government of the United States.

10. The Supreme Court of New Mexico held and decided that each of the claimants to the land in controversy was entitled to an undivided moiety thereof.

11. The Supreme Court of New Mexico failed to confirm the judgment and decree of the district court for San Miguel County, New Mexico, and modified such decree so as to confirm the title of each of said claimants to an undivided moiety of the land in controversy, and directed that possession be given in accordance with such title.

126 Wherefore, said Andrieus A. Jones, Receiver and Appellant, prays that the judgment and decree of the said Supreme Court of the Territory of New Mexico be reversed and for naught held, and that said court be ordered to enter a judgment and decree affirming the judgment and decree of said district court of San Miguel County in said cause.

ANDRIEUS A. JONES,
Attorney and Counsellor for Appellant.

East Las Vegas, New Mexico.

127 [Endorsed:] In the Supreme Court of the United States. George W. Stoneroad, et al. vs. William P. Beck, et al. In the Matter of the Intervention of the St. Louis Land and Cattle Company. The St. Louis Land & Cattle Company, Intervenor and Appellee vs. Andrieus A. Jones, Receiver, Appellant. Assignment of errors.

Endorsed on cover: File No. 23,077. New Mexico Territory Supreme Court. Term No. 203. Andrieus A. Jones, Receiver, Appellant, vs. St. Louis Land and Cattle Company. Filed March 4th, 1912. File No. 23,077.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

ANDRIEUS A. JONES, RECEIVER, Appellant,
vs.
ST. LOUIS LAND AND CATTLE CO. } No. 203.

Appeal from Supreme Court of New Mexico.

Statement.

In the year 1876 George W. Stoneroad, et als., instituted a proceeding in equity and under the statute of New Mexico against William P. Beck, et als., for the purpose of determining the title of the parties in and to what is known as the Preston Beck Grant and for a partition of the same This grant conflicts with a certain other grant known as the Perea Grant to the extent of about 5,000 acres. In the year 1903 Andrieus A. Jones was appointed Receiver of the Beck Grant and soon afterwards entered into possession of the same, including the portion in conflict. The St. Louis Land and Cattle Company filed an intervening petition in said cause and set up its claim to the land so in conflict and prayed as relief that the Receiver be ordered to surrender the possession of such conflict to the intervenor. The Receiver and claimants of the Preston Beck Grant filed an answer to the intervening petition and, among other things, denied that the intervenor had any right, title, or interest in or to the land in conflict. Much testimony upon these respective claims was taken, and the District Court decided in favor of the Re-

ceiver and dismissed the intervening petition. From this decision and the decree rendered thereon, the intervenor appealed to the Supreme Court of the Territory of New Mexico. In the brief filed on behalf of the intervenor in the Supreme Court of New Mexico and in the decision of that Court it is conceded that the only question for determination is which of the parties to this proceeding has the better title to the land in conflict as shown by the documentary evidence pertaining to each grant.

On December 6, 1823 (R. P., 47), Juan Estevan Pino made a petition to the Political Chief of New Mexico for a grant of land. This petition was referred by the Political Chief to the Provincial Deputation of the Territory of New Mexico for its consideration (R. P., 48), and the petition was duly considered by the Provincial Deputation and that body recommended (R. P., 49) that the grant be made. Under date of December 27, 1823, the Political Chief executed the grant in porper form (R. P., 50). Subsequently, on the 29th day of August, 1825, Don Tomas Sena, Alcalde, placed Pino in juridical possession of the tract of land known in this proceeding as the Beck Grant (R. P., 51). Subsequently the heirs of Juan Estevan Pino by mesne conveyances conveyed this grant to Preston Beck, jr. On the 10th day of May, 1855, Preston Beck, jr., filed in the office of the Surveyor-General for New Mexico his petition for a confirmation of this grant (R. P., 52), and on September 30, 1856, the Surveyor-General favorably reported this grant to Congress for its approval in accordance with his recommendation, which appears in the record, pages 53-56.

In November, 1824, Pedro Jose Perea petitioned the Territorial Deputation of the Territory of New Mexico for a grant of land (R. P., 41), and subsequently, on the 3rd of March, 1825, the Territorial Deputation undertook to make the grant so petitioned for (R. P., 42). The Territorial Deputation by the same decree directed the petitioner to present himself to the Justice, Juan Estevan Pino, for the purpose of being placed in possession. This grant nowhere

purports to have been made by or on behalf of the Governor of the Territory of New Mexico, and it does not appear that juridical possession was ever delivered to Perea. On May, 15, 1857, a petition was filed by the claimant of the Perea Grant in the office of the Surveyor-General of New Mexico for the purpose of securing the confirmation of said grant (R. P., 43-44), and on September 15, 1857, the Surveyor-General favorably reported said grant for the action of Congress (R. P. 45).

By the Act of the Congress of the United States approved June 21, 1860, both the Beck Grant and the Perea Grant were confirmed, the one being No. 1 and the other No. 16 in said act of confirmation. After this confirmation by Congress the Beck Grant was surveyed, and on November 23, 1860, such survey was duly approved by the Secretary of the Interior. Subsequently, under date of June 13, 1883, a patent of the United States for the Beck Grant was duly executed, properly recorded in the records at Washington, and forwarded to the Surveyor-General of New Mexico for delivery upon the payment of the cost of such survey. In July, 1871, the Perea Grant was surveyed and this survey was approved August 8, 1871.. Afterwards and subsequent to the issuance of the patent for the Beck Grant, a patent was issued by the Government of the United States for the Perea Grant.

The Act of Congress confirming these grants contained the following:

"SEC. 4. And be it further enacted, That the foregoing confirmation shall only be construed as quit claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

The Supreme Court of New Mexico decided that the respective parties herein were entitled to an undivided moiety in the overlap between the Beck and Perea grants (R. P., 77), and from this decision and decree of the Supreme Court of New Mexico an appeal has been taken to this Court.

ASSIGNMENT OF ERRORS.

The errors assigned by the appellant herein are as follows, to wit:

1. That the said Supreme Court of New Mexico, as appears by its opinion in said cause, in substance, held and decided that the political chief of New Mexico, in December, A. D., 1823, had no legal authority under the laws then existing, to make grants of land in New Mexico, by and with the advice and consent of the territorial deputation, and that the grant of land as purported to have been made to Juan Esteban Pino as appears by the granting papers constituting a part of the record in this cause, was invalid for want of legal authority.

2. The said Supreme Court of New Mexico, as by its opinion in said cause appears, in substance, held and decided that the grant of land to Juan Esteban Pino made by the Political Chief of New Mexico in December, 1823, by and with the consent of the Territorial Deputation of New Mexico, the juridical possession of the grant given in 1825, and the fact that the granting papers and official report of juridical possession remained on file in the archives of New Mexico during the time that New Mexico remained a part of Mexico, did not constitute a ratification by the government of Mexico of the Acts of the officials in making said grant and giving possession thereof.

3. The Supreme Court of New Mexico failed to find and decide that the grant purporting to have been made to Juan Esteban Pino, as shown by the record, was a legal and valid grant under the laws of Mexico.

4. The Supreme Court of New Mexico failed to find and decide that the claimant of the Preston Beck, jr., grant had a better title under the laws of Mexico to the land in controversy than the claimant of the Perea grant.

5. The Supreme Court of New Mexico failed to find and decide that the confirmation of the Preston Beck, jr., grant

by the Congress of the United States was legally prior to the confirmation of the Perea grant. .

6. The Supreme Court of New Mexico failed to find and decide that the confirmation by Congress, by the Act of June 21st, 1860, related back to and took effect as of the date when Preston Beck, jr., filed his petition with the Surveyor-General of New Mexico, asking a confirmation of the Preston Beck, jr., grant.

7. The Supreme Court of New Mexico failed to find and decide that the filing of the petition by Preston Beck, jr., with the Surveyor-General of New Mexico, the confirmation by Congress of June 21st, 1860, and the survey made in 1860 and approved on November 23rd of that year gave to Preston Beck, jr., a better title to the land in controversy than that attempted to be given to the claimant of the Perea grant by the Act of Confirmation and the subsequent survey of the Perea grant.

8. The Supreme Court of New Mexico failed to properly apply the Doctrine of Relation to the proceedings before the Surveyor-General, the confirmation by Congress, the approved survey of the Preston Beck, jr., grant, and thus give to the claimants of the Preston Beck, jr., grant a better title to the land in controversy than the claimant of the Perea Grant.

9. That the said Supreme Court of New Mexico, by its opinion in said cause appears, in substance, held and decided that neither of the claimants to the land in controversy had a better title to said land than the other, either under the laws of and proceedings under the Government of Mexico, or the laws of and the proceedings under the Government of the United States.

10. The Supreme Court of New Mexico held and decided that each of the claimants to the land in controversy was entitled to an undivided moiety thereof.

11. The Supreme Court of New Mexico failed to confirm the judgment and decree of the district court for San Miguel County, New Mexico, and modified such decree so

as to confirm the title of each of said claimants to an undivided moiety of the land in controversy, and directed that possession be given in accordance with such title.

Foreword.

(a) The decided cases involving private-land claims as reported in the decisions of many of the States and of this Court are exceedingly numerous. These decisions have involved questions in varying phases in reference to the proper construction of confirmatory acts of Congress, confirmation by other tribunals, and conflicting titles of the claimants thereto. In all this vast array of decisions, the Supreme Court of New Mexico was unable to find any decision or announced principle which would aid that Court in reaching a conclusion as to the rights of the respective parties to the land in controversy. The only decision referred to by the Supreme Court of New Mexico in justification for its decree and the only reasoning found in its decision in support thereof is as follows:

"The intervenor and appellees, holding by the same Act of Congress in so far as their grants conflict or overlap, have each an 'equal undivided moiety of the lands within the conflict.' Southern Pacific Railroad *vs.* United States, 183 U. S., 519. (R. P. 74.)"

Believing that the decision relied upon by the New Mexico Supreme Court has no application to the questions involved herein and that that Court failed to discern the principles which should be controlling in the decision of the rights of the parties to this cause, it renders it necessary to discuss at length several established principles which have been frequently announced by this Court.

(b) Before entering the discussion proper we wish to suggest that the Court bear in mind what is really meant by the terms "patent" and "confirmation." The decisions, as

will be observed, used those terms interchangeably; that is to say, the legal effect of the term as used could be interchanged for the legal effect of the other. In Shaw *vs.* Kellogg, 170 U. S.., 341, the Court says:

"There is no magic in the word 'patent' or in the instrument which the word defines. By it the legal title passes, and when, by whatsoever instrument or in whatsoever manner, that is accomplished, the same result follows as though a formal patent were issued. Rutherford *vs.* Green's heirs, 15 U. S., 2 Wheat., 296; Bryan *vs.* Forsythe, 60 U. S., 19 How., 234; Langdeau *vs.* Hanes, 88 U. S., 21 Wallace,, 521-530, in which the Court says:

"'If the claim be to quantity and not to a specific tract capable of identification and segregation, a survey will be required and a confirmation will then immediately attach to the land segregated. The land passes out of the jurisdiction of the Land Department.'"

In the case at bar, both grants have been confirmed and both have been patented. The patents add nothing to the validity of the title. Upon confirmation and approval of the surveys the titles become as complete as upon the subsequent execution of patents.

The Court is also requested to bear in mind the true significance of Section 4 of the act of confirmation, wherein it says that the act shall not affect the adverse rights of any other person or persons whomsoever. This section is similar to the expression contained in other acts of Congress which have been construed by this Court.

The Act of March 3, 1851, providing for the settlement of private-land claims in California, provided in the fifteenth section:

"That the decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons."

In the case of Beard *vs.* Federy, 3 Wall., 493, the Court in considering this section said:

"The term 'third persons' as there used does not embrace all persons other than the United States and the claimants, but only those who hold superior titles which shall enable them to resist successfully any action of the Government in disposing of the property."

The Court in Russell *vs.* Maxwell Land Grant Company, 158 U. S., 258, in construing a claim confirmed by the Act of Congress of June 21, 1860, which confirmed the grants in controversy, gave to said Section 4 the same construction which had been given to the language of the statute above referred to in the case of Beard *vs.* Federy. Many other cases could also be cited.

(c) At the threshold of this discussion it is essential that we shall discover what principle should govern in determining the queston as to which of the parties to this cause has the better title to the land in controversy. A number of cases have been decided by this Court arising upon a conflict of title under simultaneous confirmations, or confirmations which had been made under statutes which provided that the confirmation or patent should not affect the rights of other persons. In such cases the rule is uniformly established that the court will look behind the confirmations and determine as to which claimant had the better title under the former government. The better title was ascertained not only by the determination of the question whether or not the claimant had a legal or perfect title, but the court looked into all the equities surrounding both titles, and thereupon decided which was the better title. The case of Doe *vs.* Eslava, et al., 9 How., 446, was a case where the confirmations were equal. The trial court instructed the jury that—

"both were confirmed equally and the confirmation balanced each other; and to decide the controversy, the jury must look to the other evidences of title."

This Court, further discussing the case, says as follows:

"The title of the plaintiff so far as connected with the United States consisted of the confirmation of a French grant and a quit-claim patent. The title of defendant thus connected consisted of a supposed Spanish concession and a certificate of this fact entitling him to a patent if he wished. Both were confirmed at the same time by Congress The former then is no better as to title than the latter. A patent like the subsequent one in this case merely quit claiming or releasing the United States gives no title to the patentee superior to what the confirmation had given."

In Berthald *vs.* McDonald, et al., 22 How., 340, in a similar case, the court says:

"In the case of Doe *vs.* Eslava, 9 How., 421, this Court came to the conclusion (although it is not distinctly expressed) that in a contention between double concessions which balanced each other proof could be heard and must of necessity be heard to determine the better right between the contending parties."

In the case of Henshaw *vs.* Bissell, 18 Wall., 266, in a similar controversy, the Court says:

"But in this case both parties stand upon patents; both have in these instruments the conveyance of the Government, and a recognition of their respective concessions under the former government. In a controversy founded upon either patent as against imperfect or equitable claims or interests obtained since the acquisition of the country the same language might be repeated which is used in the cases cited. But in the presnt controversy between parties claiming under two patents, each of which reserves the rights of other parties, the *inquiry must extend to the character of the original concessions.* The controversy can only be settled by determining which of these two gave the better right to the demanded premises."

The Court then in deciding the case looked behind the confirmation and decided as to the better right. One, at

at least, of the grants, and perhaps both, were imperfect, but the Court was able to find sufficient equities in favor of one of the parties so as to decide which had the better title.

Rodrigues *vs.* United States, 1 Wall., 582, was a case where three grants had been confirmed under the act of 1851 relating to private-land claims in California. A proceeding had been instituted under the act of June 14, 1860, for the purpose of having the surveys of these grants judicially approved. There was a conflict in the boundaries of the grants as they had been confirmed and the Court was called upon to decide as to the rights of the respective parties. In doing this the Court went behind the confirmations and considered all the facts and circumstances bearing upon each case relating to the respective rights under the former government.

The case of Trenier *vs.* Stewart, 101 U. S., 810, was a case which also involved conflict of confirmations where the rights of third persons were protected. It was claimed that the prior confirmation should carry the title, but the Court said:

"Priority of recognition is claimed in favor of the other donee, but the decisive answer to that suggestion is that the Act of Congress making it reserves in terms the rights of others and limits the operation of the act to the relinquishment of any claim of the United States to the land."

If in looking behind the confirmations we should find that the respective grants were invalid, and should also find that that no equities existed from which the better title could be ascertained, we are not left without a decision of this Court to guide us. In the case of Miller *vs.* Dale, 92 U. S., 474, this Court said:

"The defendant asserts title to the premises under a patent issued upon a concession of the Mexican Government, confirmed by the tribunals of the United States; the confirmation dating in March, 1857, and the patent being issued in January, 1859. The approved survey of the plaintiffs and the patent of the defendants both include the land in con-

troversy; the question therefore for consideration is which of the two titles gave the better right to the premises. To answer this question, we must look into the character of the original concessions; and if they furnish no guide to a just conclusion, we must seek a solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined."

In the case at bar, both parties claim the land in question under confirmation and patent by the United States. They are both founded upon grants purported to have been made by the Mexican Government. Under the foregoing decisions of this Court, it is incumbent upon us to look behind the confirmations and endeavor there to find whether or not one of the parties had a better title to the land in controversy, or whether or not there were equities existing in favor of the claimants of one of the grants which were superior to the equities in favor of the claimants to the other grant. If this Court should find that neither party had a better title under the Mexican Government, then the case necessarily falls within the principle announced in Miller *vs.* Dale, *supra*, and "we must seek a solution in the proceedings had before our tribunals or officers by which the claims of the parties were determined."

Having now ascertained the rules which shall guide in the solution of the case, the following discussion is presented:

FIRST.

LOOKING BEHIND THE CONFIRMATIONS THE CLAIMANTS OF THE BECK GRANT HAD A BETTER TITLE UNDER THE MEXICAN GOVERNMENT THAN THE CLAIMANTS OF THE PEREA GRANT.

A.

The claimants of the Perea Grant had no title, legal or equitable, under the Mexican Government.

The Perea Grant was made at the same time and by the same official action and the official acts are set forth in the same documents as the Antonio Chaves Grant. This latter grant was not confirmed by Congress, but was presented to the Court of Private Land Claims, and the decision of that court was reviewed by this Court. The decision of this Court appears in Haynes *vs.* United States, 170 U. S., 637, and it was there held that this grant, the same as the Perea grant, was void for want of legal authority in the Deputation to make the same. Pedro Jose Perea, the original petitioner for the Perea grant, was never placed in juridical possession by any Mexican official. Under the Mexical law juridical possession was essential to the transfer of title. In Malarin *vs.* United States, 1 Wall., 289, the court says:

"When the grant to Pacheco was issued, there still remained another proceeding to be taken for the investiture of the title. Under the civil, as at the common law, a formal tradition or livery of seizin of the property was necessary."

See also United States *vs.* Pico, 5 Wall., 539; Moore *vs.* Steinbach, 127 U. S.., 80; Ainsa *vs.* United States, 160 U. S., 234; United States *vs.* Pena, 175 U. S., 504.

Counsel for appellee admitted in their brief filed in the court below that the claimant of the Perea grant had no title, either legal or equitable, to the land in question. In that brief it was said:

"Neither of the claimants had title, either legal or equitable, to the land claimed, in fact, they had no title of any kind whatsoever, perfect or imperfect, and but for an act of Congress confirming the claims, the lands embraced within the exterior boundaries of the grants would have remained as they were prior to Congressional action, *public lands of the United States.*"

B.

Claimants of the Beck grant had a perfect legal title under the Mexican Government.

(a) The Beck grant was made upon a petition by Juan Estevan Pino to the political chief of New Mexico in 1823, and that political chief, by and with the consent of the provincial deputation, executed the grant on December 27, 1823. In 1825 Pino was placed in juridical possession by the constitutional alcalde and a report of this proceeding was placed on file in the public archives and made a part of the official records of the Government. All these original documents remained among the public records until the cession of this country to the United States, and such documents are now in the custody of the Surveyor-General of New Mexico. No objection was made by the intervenor or the court below to the form of those proceedings. In every respect all the formalities and proceedings required by the laws of Spain at the time of the independence of New Mexico were fully complied with. Intervenor and the Supreme Court of New Mexico simply took the position that there was a lack of power or authority in the officers of New Mexico to make a valid grant at the time the Pino or Beck grant was made. It is conceded that if the officials of

New Mexico, at the time of the making of this grant, had been officers of this province under the Spanish empire, the grant would have been a perfect one, but it is insisted that inasmuch as Mexico had gained her independence from Spain and that New Mexico was in 1823 a province of the independent Government of Mexico, these officials in New Mexico had no longer authority to dispose of the public domain. It was insisted in the court below and so decided that upon the change of sovereignty the laws of Spain relating to the disposition of the public domain were not continued in force under the new sovereign. To this position the writer can not give his assent.

The circumstances surrounding the independence of Mexico from Spain and the organization of the new government are unique in history. For some years prior to the 24th of February, 1821, a revolution had been in progress by the citizens of Mexico against the Spanish Government. At that time the forces of Mexico were in possession of a large portion of the country, and General Iturbide at the town of Iguala, issued a proclamation to the inhabitants of New Spain setting forth the necessity of independence and informing them that he had formed a plan for the formation of national principles and the establishment of a future government. This was the celebrated "plan de Iguala." This plan for the new government, as thus promulgated, among other provisions, contained the following:

"The Junta will take care that all the revenues of the Department of the State remain without any alteration whatever, and all the employees, political, ecclesiastical, civil, and military will remain in the same state in which they exist today."

The revolution proceeded. Subsequently, on the 30th day of July, when Juan O'Donoju, who had been appointed by the Spanish Government the Jefe Politico and Captain-General of New Spain, arrived at the port of Vera Cruz (12 Bancroft, 726), O'Donoju saw at once how absurd it would

be to attempt to uphold a lost cause and he therefore resolved, now that Mexico was irremediably lost to Spain, to secure for the reigning family of his country the throne about to be erected in the new nation, and to preserve the sfriendly relations between the two peoples (12 Bancroft, 727). O'Donoju made friendly overtures to Iturbide, who granted him permission to advance as far as Cordoba for the purpose of holding a conference with him. At this conference Iturbide proposed that by treaty the "plan de Iguala" should be adopted and O'Donoju assented, and in his sovereign's name recognize the independence of Mexico. This treaty consisted of seventeen articles, which confirmed the "plan of Iguala" with a slight difference in the third article. This treaty, among other things, provided, in substance, as follows (12 Bancroft, 728):

"ARTCLE 1. This America shall be recognized as a sovereign independent nation called the Mexican Empire. 2. The government of the empire shall be a moderate constitutional monarchy. 3. The oath prescribed in Art. 4 being previously taken the following shall be called to reign over the Mexican Empire. In the first place, Fernando VII, Catholic King of Spain; by his renunciation or non-admission his brother Carlos; for the same reasons, next after him his brother Francisco de Paula: next Carlos Luis, a Prince of Spain and former heir of Etruria and now of Lucca; and in case of his renouncing or not accepting, then, such person as the Imperial Cortes may designate. 4. The Emperor shall reside in Mexico as the Capitol of the Empire. 5. General O'Donoju shall apppoint two commissioners provisionally to make this arrangement known to the court of Spain, pending the formal tender of the crown by the Imperial Cortes. 6. A sufficiently numerous junta shall be constituted composed of members prominent for their virtues, offices, fortunes, representations and character. 7. The junta shall be entitled 'Junta Provisional Gubernativa.' 8. General O'Donoju shall be one of the members. 9. The junta shall elect a president chosen from among its members. 10. The junta's first act shall be to apprize the public of its installation, object, and such other things as it may deem expedient. 11. The junta after choosing its president shall

elect a regency of three persons to constitute the executive and govern in the monarch's name until he shall assume the sceptre. 12. The junta shall rule according to existing laws not clashing with the Plan de Aguala till the Cortes form a national constiution. 13. The Regencia shall convoke the Cortes in conformity with Art. 24 of the plan. 14. The executives shall reside in the regencia, the legislative in the cortes, and until the latter are installed in the junta provisional gubernativa acting in concert with the regencia."

From the foregoing it will be observed that the independence of Mexico thus obtained contemplated the creation of an Empire having close friendly relations with Spain; that a member of the Royal family of Spain should be the Emperor; that all existing laws of Spain should continue in force; and that all officers under Spain should be continued in office with the same authority which they had previously exercised under the Spanish government. In pursuance of this Plan de Iguala and the Treaty of Cordoba, the Regency and the Junta Provisional Gubernativa were organized. On September 28th, 1821, the nominees selected by Iturbide for the formation of the Junta Provisional Gubernativa which was to be invested with the legislative power, assembled in the principal hall of the palace, O'Donoju being present. Iturbide outlined the principal matters to which they would have to give their attention, expressed his obedience to their direction, offered his services and those of the army for the maintenance of their authority. He then pronounced the junta formally installed and the members thereupon proceeded to the Cathedral where the form of oath which had been agreed upon was administered, each individual swearing faithfully to observe the *Plan of Iguala* and the *Treaty of Cordoba* and honorably discharge the duties he had been called upon to perform (12 Bancroft, 734). A decree of this new government of October 5th, 1821, was promulgated and is as follows:

"Habilitation and confirmation of all authorities for the purpose of legalizing their functions.

"The sovereign provincial council of government of the

Empire of Mexico, considering that from the moment it solemnly declared its independence from Spain, all authority for the exercise of the administration of justice and other public functions should emanate from said Empire, has seen fit to habilitate and confirm all authorities as they now are, in conformity with the plan of Iguala and the treaty of the village of Cordoba, for the purpose of legalizing the exercise of their respective functions."

It thus appears that by definite action the Mexican Government continued in force all the laws of Mexico including the authority of the Government of New Mexico to dispose of public lands. It would seem that this proposition was expressly decided by this Court in Ely *vs.* United States, 171 U. S., 221. This was a case instituted before the court of private land claims for the purpose of having confirmed a grant of land obtained upon petition to the Intendant of the provinces of Sonora and Sinaloa. The proceedings to acquire this title were initiated by a petition to the Intendant on May 29th, 1821, and that so far as that officer was concerned they were concluded and the sale was completed on September 20th, 1821. Nothing seems to have been done after this date until May 15, 1825, when the commissary general issued a title in the usual form. In resisting the confirmation of this claim counsel for the United States contended that the officers who assumed to make the grant and to execute title papers had no authority to do so and upon that ground it was held by the court of private land claims that the grant was in its inception invalid. After making this statement of facts, the court says:

"So the question is as to the power of these officers to bind the Government of Mexico."

The court then proceeds to the examination of that question. The act of 1891 creating the court of private land claims prohibited the allowance of any claim, "that shall not appear to be upon a title lawfully and regularly derived from

the Government of Spain or Mexico or from any of the states of the Republic of Mexico having *lawful authority* to make grants of land."

The court also says:

"We held that under the act of 1891 the court must be satisfied not merely of the regularity in the form of the proceedings, but also that the official body or person assuming to make the grant was vested with authority or that the exercise of power, if unwarranted was subsequently lawfully ratified. . . . It must appear that the officials did have the power, and were not justified in resting upon any legal presumption of the existence of the power from the fact of its exercise."

After first discussing and deciding that the intendants had power under the Spanish Government to make sales of public land, the court proceeds to the examination of the question as to whether or not this power was continued under the Mexican Government. The court quotes the fifteenth section of the Plan of Iguala as hereinabove quoted and then quotes from the Treaty of Cordoba as follows:

"The provincial junta was to govern for the time being in conformity with the existing laws in everything not opposed to the Plan of Iguala and until the Cortes shall form the constitution of the state."

The court further says:

"Immediately after the surrender of the City of Mexico a provisional counsel or junta consisting of thirty-six members was created under the Plan of Iguala, which assumed the control of the government, and on October 5th, 1821, this provision counsel promulgated the following order:"

Here the court quotes the decree of October 5th, 1821, as hereinabove given. The court decided that the office of intendant was one of those continued in existence by the order of October 5th, 1821, and says:

"So that long after the sale here in question was made the government of Mexico recognized the office of intendant as continuing and no statute or ordinance appears which in terms, at least, took away from that officer all control over the sale of public lands."

The court discussed the cases of United States *vs* Vallejo, 1 Black, 541; and Moore *vs.* Steinbach, 127 U. S., 80, and continuing said:

"It is doubtless true that a change of sovereignty implies a revocation of authority vested by the prior sovereign in local officers to dispose of the public lands and *yet we think that rule is not controlling in this case for the new sovereign made an order continuing the functions of the local officers* and one of those officers making a sale in accordance with the provisions of prior laws caused the money received therefrom to be paid into the treasury of the new sovereign and that sovereign never returned the money thus received or challenged the validity of the sale thus made."

It would seem that that decision should be decisive of the case at bar, as it furnishes sufficient authority for the contention that the Beck grant is a perfect grant made in due form by the proper officers having express authority There are other decisions to the same effect. When the Beck grant was before the Surveyor-General of the Territory of New Mexico for confirmation there was a contest between Beck and Hatch et al., who undertook to prevent the confirmation of the grant. One of the objections to the confirmation was as follows:

"The want of authority vested in the political chief of the Territory, Bartolme Baca, to make a grant of land—the Republic of Mexico having just severed itself from the sovereignty of the Spanish Government and no permanent government being established and all the laws of the Span-

ish government previously in force being annulled by the act of independence." (R. p. 403.)

The Surveyor-General in disposing of this case says:

"The government of Spain vested in the supreme officers of the ultermarine provinces under its sovereignty the right of separating from the public domain such portion of land as they deemed proper for the promotion of agriculture, and the encouragement of stock raising, as will be seen by reference to the orders and decrees of the Spanish government, and the recopilation of the Indies.—(White's Recopilation.) When Mexico was separated from the sovereignty of Spain, and became a separate and independent government, in the year 1821, it was expressly declared 'that all the authority necessary for the administration of justice, and other public acts, should emanate from the empire (Mexican) itself. It has been proper to confirm and continue in office all the authorities for the present, and according to the plan of Iguala and the treaties of the city of Cordova, in order to legalize the exercise of their respective powers.'—Galvan's Decrees, Vol. I.

"The fifteenth article of the plan of Iguala declares that 'All political, civil and military, and ecclesiastical officers, shall continue as they are, at the present day; those only shal be removed who do not subscribe to the plan,' etc.—Galvan's Decrees, Vol. I, page 4.

"The twelfth section of the treaty of Cordova also declares that 'the provisional assembly shall be governed by the laws then in force, where they are not contrary to the plan of Iguala.'—Galvan's Decrees, Vol. 1, page 7.

"There was, therefore, no interregnum in the government and the plan of Iguala and the treaty of Cordova vested in the officers of the new government the same power and authority exercised by them under the sovereignty of Spain."

Of course, the decision of the surveyor-general in construing the confirmation of the grant is not binding upon this court and his decisions were not always accurate but his decision is quoted for the purpose of showing the conclusion to which he had arrived in 1855 soon after the cession of this country to the United States, and while the construction of the land laws of Mexico were yet fresh in the minds of the people.

In the case of U. S. *vs.* Green, 185 U. S., 257, the court

had under consideration another case very similar to the case of Ely *vs.* U. S., supra, and in the Green case the attorney for the United States objected to the confirmation of the grant on the ground that—

"The intendant ad interim Bustamente through whom the sale to Romero and others is purported to have been effected and the commissary general of Sonora who ultimately extended the title, did not possess the power in the premises which they assumed to exercise."

The court in disposing of this objection which was numbered two, says:

"The second and third grounds relied upon by the government to defeat the claim in its entirety do not require extended consideration as they are foreclosed by recent decisions of this court."

In the case of the United States *vs.* Peralta, et al., 19 How., 347-348, the Court was considering a grant in California which had been petitioned for in 1820, which was considered in June, 1821, and which was finally made by Governor Sola on the 18th of August, 1822, after the Mexican independence, and the description of the land returned by Peralta on the 7th of October, 1827. This Court in that case said:

"The appellants on whom the burden of proof is cast to show want of authority have produced no evidence either documentary or historical that the Spanish officers who usually acted as Governors of the distant provinces of California were restricted in their powers and could not make grants of land. * * * An attempt to trace the obscure history of the various decrees, orders and regulations of the Spanish government on this subject would be tedious and unprofitable. It is sufficient for the case that the archives of the Mexican government show that such power has been exercised by the Governors under Spain and *continued to be so exercised under Mexico* and that such grants made by the

Spanish officers have been confirmed and held valid by the Mexican authorities. Sola styles himself political and military Governor of California. He *continued to exercise the same powers after his adhesion to the Mexican government under the provisions of the plan of Iguala and the twelfth section of the treaty of Cordova.* The grant in fee given by Sola was after the revolution.* * * The plaintiff in error has not been able to produce anything from historical documents or the archives of California tending to show a want of power in the respective officers in this case. On the contrary the presumption of law is confirmed by both. * * * As the validity of the petitioner's title has been assailed on the ground of *want of authority alone,* it is unnecessary to notice more particularly the various documents exhibited in support of it. The grant by Sola of a portion of the tract of which Peralta had been originally put in possession is a *complete grant in fee* for that portion."

Justice Brocchus of the Supreme Court of New Mexico in a concurring opinion (improperly designated as dissenting opinion in the published report) in the case of Pino *vs.* Hatch, 1 New Mexico, 133, discussed the title to the Beck Grant upon principle and authority and decided that this grant was perfect and was made by lawful authority.

The Supreme Court of New Mexico in its decision in this case refers to only one case as authority for the proposition that the officials of New Mexico were not authorized to dispose of the public domain after the change in sovereignty. This is the case of Leese *vs.* Clark, 3 Cal., 16, in which the Court says:

"The royal decrees, regulations and usages ceased to have any effect whatever as to subsequent grants of land. This point was determined by the Mexican Congress in a case which arose shortly after the independence of that government and has ever since been acquiesced in. On the 17th day of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas. On the 19th of August the Mexican Governor of that province (Martinez) assuming the powers properly exercised by the royal governors modified the grant in favor of the younger Aus-

tin. Had the royal laws and usages still continued to retain their force, the acts of Martinez would have been valid but the Mexican Government at the same time it recognized the act of the royal governor as valid, because done before the change of sovereignty, refused to confirm the act of its own governor, done after the change, on the ground that the sovereignty could be exercised only by the Mexican nation."

If, as stated in this decision, the Mexican Government took the action attributed to it, and by its Congress made any such determination, it is strange indeed that the action of the Mexican Congress was not referred to by this Court in the *Ely* case, *supra*. We have made a search for some authoritative statement of this alleged action on the part of the Mexican Congress but fail to find any. If any such action was taken by the Mexican Congress it must have been taken during the reign of Iturbide, because it was during such reign that Austin obtained his first concession from Mexico. If such be the case, this act of the Mexican Congress taken during the reign of Iturbide had no effect upon the officials at the time of the making of the Beck Grant.

A history of the title to Austin's colony written by Austin himself appears in White's Recopilacion, Volume I, beginning at page 559, and appears as Title 2, Book 5, of that publication. We there fail to find any authority for the statement made as above by the California court. It appears that the elder Austin presented a memorial to the Governor of Texas, asking for permission to settle 300 families in Texas. This petition was not granted by the Governor of Texas as stated by the California court, but—

"Was sent on to the superior government of the eastern internal provinces strongly recommended by the local authorities of this province." 1 White, p. 560.

Moses Austin then left Texas for Missouri and on account of his death never returned. It appears, 1 White, p. 561, that the memorial of Moses Austin was granted on the 17th of January, 1821, by the Supreme Government of

the eastern internal provinces of New Spain at Monterey. It gave permission to said Austin to introduce 300 families in Texas.

"On the 10th of August, 1821, the younger Austin appeared in Texas and was received by Governor Martine. The Governor requested Austin verbally to furnish a plan for the distribution of land to the new settlers; he accordingly proposed one which, in his opinion, was sufficiently advantageous to the settlers and at the same time adapted to the wilderness state of the country, which required a compact location to ensure safety from the Indians. The basis established in the plan proposed was to give each head of a family and each single man over age 640 acres; 320 acres in addition for the wife should there be one; 160 acres in addition for each child and 80 acres in addition for each slave. This plan was presented in writing and Austin received authority from the Governor to promise that quantity to the settlers. He was also commissioned by the Governor to take charge of the local government of the new settlement until it could be otherwise organized." (1 White, p. 562.)

In the quotation above, it is stated that Austin received authority from the Governor to promise that quantity to the settlers. The official letter, however, which is thus construed appears in 1 White, p. 588, as follows:

"Having seen your representation to this government and finding it to be conformable with its ideas I have to inform you that, although I shall render an account of it to the supreme government for its deliberation, still not doubting it will be approved of, you can immediately offer to the new settlers the same terms contained in your proposals, assuring you that should the supreme government make any small variation, I will, in due time, communicate it to you with which I answer your aforementioned representation. God preserve you many years.

ANTONIO MARTINEZ."

It will thus be seen that the approval of the plan for the settlement was not absolutely given by Governor Martinez but the subject was referred to the General Government. Austin then left Texas for the purpose of securing his settlers.

"Austin received the first positive information of the revolution and Plan of Iguala on the 24th of February, 1821, and of the complete independence of Mexico on his arrival at Bexar in August of that year so that the official acts of Governor Martinez relative to the new settlement dated in August, 1821, were from a Governor of the independent Mexican nation and not from a Spanish Governor." (1 White, p. 565.)

In December, 1821, Austin arrived in Texas with the first immigrants and the new settlement was commenced. In March of the next year, 1822, Austin went to Bexar to make his report to the Governor, and was then informed for the first time that it would be necessary for him to proceed immediately to the City of Mexico in order to procure from the Mexican Congress then in session a confirmation of the permission to Moses Austin and receive special instructions as to the distribution of land, the issuing of titles, etc. Just when Austin reached Mexico does not appear, but it must have been about the time of the coronation of Iturbide and during that political turmoil.

In 1 White, p. 566, it is said:

"In such a state of political affairs, all that a person could do who had business to transact with the government was to form acquaintances, try to secure friends and wait for a favorable opportunity. * * * On examination into the state of his colonization business he found that the regency had decided that the governor of Texas, Martinez, *was not sufficiently authorized to stipulate what quantity of land the new settlers were to get*, as he did by his letter to Austin on the 19th of August, 1821, and that this point must be settled by a law of Congress, for which purpose all the doc-

uments relative to said settlement were transmitted by the regency to Congress. This at once explained the reason why Governor Martinez urged Austin to go to Mexico for he was doubtless then well aware that in the then existing state of political affairs, nothing would be done in the business unless someone was present to attend to it."

It would seem that there had been no denial of authority in the local officials to make grants of land but the regency simply decided that Governor Martinez had no authority to agree with Austin as to the quantity of land which should be given to the individual settlers in the Austin Colony. Indeed, we are inclined to agree that Martinez had no such authority because we are unable to find any law, decree or regulation issuing from the Spanish Government authorizing a Governor of a province to make a colonization contract and agree as to the quantity of land which the contractor should give to each settler. In this history of the Austin colony, or no where else, save in the California decision *supra*, have we been able to find any statement that Governor Martinez had been divested of any authority which existed in him as a Spanish Governor by reason of the change of sovereignty. At the time Austin appeared in Mexico, clearly the matter had not been acted upon by the Mexican Congress as stated in the California decision, but had simply been referred to the Congress and was then pending. Had there been any such action by the Mexican Congress as attributed to it by the California court, it would have been important as affecting land titles in New Mexico and Arizona, and it is strange indeed, that such action was not found by Mr. Reynolds, the attorney for the court of private land claims, who made a compilation of all the laws which he could find affecting such title. Nothing can be found in Reynold's compilation of Spanish and Mexican land laws of that nature. Nor does it appear that any other court has ever had called to its attention any such action of the Mexican Congress, so far as we have been able to ascertain.

The Supreme Court of New Mexico further commenting upon the asserted action of the Mexican Congress concerning the Austin grant says, "It was an interpretation of the plan of Iguala, treaty of Cordova, and order of October 5, 1821, by the Supreme power of Mexico and furnishes us the best means of construction," and refers to the case of U. S. *vs.* Sherbeck, 27 Federal Cases. 16275, where the District Court of California said:

"In the absence of any udicial decisions which determine the construction and effect of a foreign law the practical interpretation given to it by those *whose duty it was to apply and administer it* affords the best means of ascertaining its true meaning. Unless, therefore, it be clear that the officers charged with its administration have misconstrued it a foreign court with necessarily an imperfect acquantance with the subject ought to be slow to substitute its own construction of the law for that of the government which established it, or to declare that powers frequently exercised and generally acquiesced in were usurped."

With the principle of law announced in this decision we take no issue, but we do contend that the Supreme Court of New Mexico was unwarranted in construing what was stated in Austin's report of the happenings in Mexico regarding his grant as a declaration by the regency of Mexico or the Mexican Congress that the officials of the provinces of Mexico were not further authorized to make grants of the public domain to individuals. As previously stated in this brief, it appears that the officials of New Mexico and California continued in the exercise of such functions after the independence of Mexico. These were the administrative officers, and from the time of the independence of Mexico to the passage of the general colonization law in August, 1824, by the Mexican Congress, as shown by the decision of the Supreme Court of New Mexico in this case, the officials of New Mexico made or attempted to make at least ten grants. Four of these grants were confirmed by the Congress of the United States. This action by our Congress was taken upon a report of the Surveyor-

General of New Mexico, which expressly held that the officers of New Mexico after the independence were clothed with the same authority with reference to the public domain as were the officials under the government of Spain. Six grants made by the officers of New Mexico are referred to as having been disallowed by the Court of Private Land Claims, but the reasons for such disallowance do not appear.

As against the opposing opinion of the Supreme Court of New Mexico in the case at bar, corroborated in part by the California Court, ample authority for the existence of the power in the New Mexico officials to make the grant to Pino is found in:

The decision of the Surveyor-General of New Mexico.
Confirmations by the United States Congress.
The opinion of Justice Brocchus in Hatch *vs.* Pino, *supra.*
U. S. *vs.* Peralta, 19 How., 348.
U. S. *vs.* Green, 185 U. S., 257.
Ely *vs.* United States, 171 U. S., 221.

(b) ***The fact that the officers of the Mexican government continued to make disposition of the public domain in accordance with the laws of Spain raises a legal presumption in the case at bar that authority to do this existed.***

That the Intendant continued to make sales of land appears from the cases of Ely *vs.* United States and United States *vs.* Green, *supra,* and other cases; that in New Mexico and California the Governors continued to make grants of lands appears from the cases above cited.

The court in Ely *vs.* U. S., 224, said:

"When the statutes and ordinances defining the powers and duties of an officer are somewhat indefinite and general in their terms, and that officer was in the habit of exercising the same power as was exercised in the case presented and such exercise of power was not questioned by the authorities of Mexico and grants purporting to have been made by him were never challenged, there is reason to believe that the true construction of the statutes or ordinances supports the *existence of the power.* Cases now before us disclose that about the time the intendant acted in this case similar action

was taken by him in respect to other applications for the purchase of land; that through a series of years from 1824 downward the commissary general, the officer created by the act of September 21st, 1824, recognized his acts as creating equitable obligations on the part of the government, and attempted to consummate the sales by papers passing the legal title that the title papers thus executed were duly placed of record in the proper office, and fail to show that subsequently thereto the Mexican government took any steps to question the title or disturb the possession. While this may not be conclusive as to the validity of the grants and the existence of the power exercised by the intendant it certainly is persuasive and we should not be justified in lightly concluding that he did not possess the power which he was in the habit of exercising."

In the case of U. S. *vs.* Peralta, 19 How., 347, the court says:

"We have frequently decided that the public acts of public officers purporting to be exercised in an official capacity and by public authority shall not be presumed to be usurped but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of titles."

The same court in the Ely case *supra*, would undoubtedly have decided the case upon the principle thus quoted from the Peralta case had it not been for the statute of 1891 under which it was proceeding and which expressly required that the legal authority for the making of grants should affirmatively appear. In the case of Pino *vs.* Hatch, 1 N. M., beginning at page 133, Justice Brocchus in rendering a concurring opinion (improperly designated as dissenting opinion in the published report) held that the Beck Grant was perfect and made by lawful authority. In that opinion there is an extended discussion as to the legal presumption attending the exercise of power by public officers. This opinion was rendered in January, 1855, is really a treatise on that subject made soon after the acquisition of this country by the United States and should be highly persuasive. In the main opinion of the court there is nothing of a con-

trary nature. The court in the main opinion simply declined to pass upon the validity of the grant. We therefore, contend that both by express action of the Mexican government and legal presumption, it must be decided that the Beck Grant was a perfect grant and made by lawful authority.

(c) *The making of the Beck grant was ratified by the Mexican government.*

Thus far we have attempted to show that the Mexican government expressly continued the authority in the governor of New Mexico to make a grant of land in accordance with the laws of Spain.

It has doubtless already been observed that such authority need not be direct but it may be conferred by subsequently ratifying or sanctioning the act of the governor in making the grant. This is expressly held in the case of Pino *vs.* Hatch, 1 N. M., 125, and also in the case of Ely *vs.* U. S, 171 U. S., 232-234. As heretofore stated, the grant was made in 1823, juridical possession given in 1825, and these documents were placed in the governmental archives and there remained until the cession of New Mexico to the United States, and of course, are still among the public records. Pino took possession of the property and he or his assigns have been in possession from that time until the present. We therefore, say that the act of the governor in making the grant, by and with the consent of the Provincial Deputation, and the act of the alcalde in giving juridical possession were ratified and acquiesced in by the Mexican government, and that these facts constituted a recognition by the Mexicon government that the governor and the alcalde had authority to do what they did. We believe this proposition to be fully decided in the case of *Ely* vs. U. S., *supra*. In the *Ely* case, the court refers to the fact that the money received by the Intendant had been paid into the treasury of the new sovereign and the proceedings had been passed upon and approved by the promoter fiscal, and then says, (p. 232):

"It would seem not unwarranted and unreasonable to refer to the familiar rule that where an agent even without express authority makes a sale of the property of his principal, and the latter with full knowledge receives the money paid on account thereof, his retention of the purchase price is equivalent to a ratification of the sale. We do not mean however, to state this as a general proposition controlling all municipal and governmental transactions *but only as one of the circumstances tending to strengthen the conclusion that these acts of the Intendant were not mere usurpations of authority but were in the discharge of duties and the exercise of powers conceded to belong to his office.*"

The Court further says (p. 233):

"Obviously these articles gave to this newly created officer the fullest powers in respect to the national revenues. When an office is created with such large powers as these, and the incumbent thereof, reviewing proceedings theretofore had by prior representatives of the government, and finding that a sale made by one of such prior officers has resulted in the payment of the cash proceeds thereof into the public treasury, confirms his action, ratifies his proceedings and issues appropriate title papers therefor, it would seem that any doubts which might hang over the power of the prior officer were put at rest, and that thereafter no question could be raised as to the *validity* of the sale.

"And indeed, such seems to have been the assumption on the part of the government of Mexico, for there is no suggestion that from the time of the execution of these title papers in 1825 up to the date of the cession, 1853, the government ever raised any question as to the *validity* of the sale or sought to disturb the possession of the grantee. While, of course, time does not run against the government, and no prescription, perhaps, may be affirmed in favor of the validity of this grant, yet the inaction of the government during these many years is very persuasive, *not merely that it considered that the Intendant had the power to make the sale, but that, in fact, he did have such power.*"

Authority for this proposition is also found in U. S. *vs.* Peralta, 19 Howard, 344, and in Shaw *vs.* Kellogg, 170 U. S., 339, in which latter case the court says,

"Mention of that fact was also made in subsequent reports to that body, and yet, from that time to the present, Congress has taken no action in the matter, and has thus, by its silence confirmed the proceedings of the land department."

An able discussion of this question is found in the opinion of Brocchus, Justice, in Pino *vs.* Hatch, 1 N. M., 125, and we would respectfully invite a careful reading of this opinion. We will only quote from that opinion briefly as follows:

"This grant (Beck grant) appears from the record to have been made in the year 1823, twenty-five years before the Republic of Mexico parted with the right of soil and her political authority over this territory wherein the land in question lies and where the grant thereof was made. The act of granting this land was, of course, a public proceeding. The record thereof passed to the archives of the government and it is to be presumed and admitted that such official functions when exercised by the high public authorities of the provinicial government were not unknown to the supreme national authority. It is not to be supposed that a nation would establish within her own domains a provincial or subordinate government, appoint officers thereto, and devolve upon them the responsible duty of managing the affairs and superintending the interests of that subordinate government without taking cognizance of the important acts of his functionaries. It appears, then, that the supreme national government of Mexico acquiesced in the act of its subordinate authorities in this province in making the grant of land here in question after the lapse of about twenty-five years. We are to construe the silence of the supreme authority in regard to the public acts of its subordinate authorities into a confirmation or approval of those acts. It has not been shown that the supreme national government did any act, passed any law or issued any edict disavowing grants made in this manner or by these authorities. It does not appear that anything has been done by the national government of Mexico tending to indicate that she disapproved of such proceedings, but on the contrary those functionaries were permitted for years to go on uninterruptedly in the exercise of such powers. * * * After the lapse of nearly twenty-five years from the period of this grant this

territory passed from the ownership of Mexico into that of the United States, and in the transition from the jurisdiction and authority of the old government to that of the new, the plaintiffs brought with them this grant which had been respected and maintained inviolate for nearly a quarter of a century, and they now ask us if we will not recognize as lawful and valid an act from a high official source which for so long a period had the unreserved acquiescence of their former sovereign."

C.

If the title to the Beck grant was not perfect under the laws of Mexico, yet it was a better title than the title to the Perea grant.

It will be remembered that the original grantee of the Beck grant was placed in juridical possession and under a grant which purported to convey absolute title. This possession was held by the grantee and his assigns until the change of sovereignty, about twenty-five years. There is no claim that the Perea grant was made by any lawful authority or by any person or body that frequently assumed to exercise such power. Perea never had possession under the Mexican Government. If Perea had assumed to occupy the land in controversy under the Mexican government he would have been a mere trespasser and the owners of the Beck grant could have maintained ejectment against him under such title as they had. This is substantially decided by the Supreme Court of New Mexico in the case of Pino *vs.* Hatch, 1 N. M., 125. The *syllabi* of this case are misleading. It was a suit in ejectment brought by the heirs of Pino against Alexander Hatch. Upon the trial of the case in the District Court, the title papers pertaining to the Beck grant were offered in evidence but were not admitted. The Court in the main opinion, declined to pass upon the validity of these title papers because it was not necessary for it to do so in order to decide the case. The court, however, decided that even though the governor of New Mexico might

not have the power to grant an absolute title to Pino, yet he did have power to control and give lawful possession of the public domain.

The court at page 129 says:

"But suppose, for the sake of argument, that the ground is assumed as invulnerable that Baca had not been empowered to grant the title to the premises, ought the court to have permitted the documents to have gone to the jury? We think it should. The rule of Spain had been driven from the country. Mexico herself was passing through tumults and revolutions. The Mexican confederation had not then been formed. The next year, after Baca's grant, the federal constitution was established. The government of this province, as proven by witness Vigil, had been turned over to the Republic of Mexico in 1821. Baca describes himself as having been assisted by a provincial deputation. They doubtless had the power, and did exercise the functions to regulate (and to what extent is not now essential to inquire) the internal affairs of the province and preserve the public peace. *If they had not the legal authority to grant the title and fee simple in the public domain, we must concede to them as having had the power to regulate the possession and prescribe rules for the occupancy of the domain.* The very necessity growing out of the condition of the inhabitants, their wants and welfare, presumes the power to have existed. The use of the soil for settlement, improvement, and cultivation, and for the erection of establishments for mechanical purposes, could have been properly granted: See 2 How., (U. S.), 603. The documents to give them no other right, would have aided the plaintiffs in showing the time when and the manner in which their ancestors gained possession of any portion of the premises claimed, and the point of time from which the prescription they strive to prove, as the rancho was actually occupied, began to run as against all individuals not having a higher claim to the possession. This court is fully aware of the importance of giving full effect to the laws in this territory, which bind the courts to protect the rights of possession, improvement and occupancy, *bona fide* and peacefully acquired."

Referring to the case of Pollard's Lessee *vs.* Files, 2 How., 603, cited in the case of Pino *vs.* Hatch, supra, we believe that case to be decisive upon this point in the case at bar.

The Spanish authority who purported to make the grant to Pollard of the land in question in that suit admittedly had no authority to make the grant of land, but the court held that the party who obtained such grant and possession thereunder did have an equitable claim to the land which should be recognized as a good title as against anyone who did not have a better title. In that case this Court said:

"After the country west of the Perdido had been acquired by the treaty of 1803, the Spanish Government continued to exercise jurisdiction over the country, including the city of Mobile, for some nine years; the United States not seeing proper to take possession, and Spain refusing to surrender it, on the assumption that the country had not been ceded by that Kingdom to France in the treaty of 1800; and of course that it did not pass to this country by our treaty with France. That Spain had no power to grant the soil during the time she thus wrongfully held the possession, is settled by the cases cited of Foster and Elam *vs.* Nelson; and Garcia *vs.* Lee. But the right necessarily incident to the exercise of jurisdiction over the country and people rendered it proper that permits to settle and improve by cultivation; or to authorize the erection of establishments for mechanical purposes, should be granted. And to this end, the concession to Pollard, of December, 1809, was made. He set forth in his petition to the commandant that he had a mill established on his plantation, and often came to Mobile with planks and property from it; and that he wished a place propitious and suitable for the landing and safety thereof; and having found a vacant piece at the river side between the canal of Forbes and Co., and the public wharf, he solicits the commandant to grant him said lot on the river bank to give more facility to his trading. This lot the government granted to Pollard for the purpose set forth by him.

"The use, for the purpose solicited, during the time the Spanish authorities were exercised, could be properly granted. Of this there can be no doubt.

"Very many permits to settle on public domain, and cultivate, were also granted about the same time; which were in form incipient concessions of the land, and intended by the governor to give title, and to receive confirmation afterwards from the king's deputy, so as to perfect them into a complete title. Pollard's was also of this description. Although the United States disavowed that any right to the soil, passed by such concessions; still they were not disregarded as

giving no *equity to the claimants*; on the contrary, the first Act of Congress passed (of April 25, 1812,) after we got possession of the country, appointed a commissioner to report to Congress on them in common with all others originating before treaty of 1803 took effect."

It is a generally accepted doctrine that bare possession of real estate gives a good title, except as against one who can show a better title. The Supreme Court of New Mexico, in commenting upon this question of possession (R. P., 76), says:

"We note, however, that the petition for the Perea grant, made after the Beck grant, recites possession, and upon that an order favorable to the petition was made by authorities claiming to have power to pass title; so that if we are to impute a permissive possession from the Beck grant, we must likewise impute a permissive possession from the Perea grant. We recognize, however, as between these two, the difference that in the Beck grant there was juridical possession and in the Perea grant there was not."

The court evidently overlooked the fact that the possession which Perea had was south of the Pecos River, and that River was the southern boundary of the Beck grant. The Territorial Deputation directed Esteban Pino, who was an alcalde, or constitutional justice, to give juridical possession, but as he was the grantee of the Beck grant, it is probable that he foresaw the conflict and juridical possession was never given. The occupation of Perea south of the river was evidently nothing more than that of a trespasser. If the owners of the Beck grant had a title, of any character, *better* than that of the owner of the Perea grant, the decision of the lower court should be reversed.

The cases referred to in the early part of this brief as authorities for this proposition are:

Doe *vs.* Eslava, 9 How., 446.
Berthald *vs.* McDonald, 22 How., 340.
Henshaw *vs.* Bissell, 18 Wall., 266.
Rodrigues *vs.* U. S., 1 Wall., 582.
Trenier *vs.* Stewart, 101 U. S., 810.

SECOND.

THE PROCEEDINGS HAD BEFORE THE TRIBUNALS AND OFFICERS OF THE UNITED STATES BY WHICH THE CLAIMS OF THE PARTIES WERE DETERMINED GIVE THE BETTER TITLE TO THE BECK GRANT.

In the foregoing discussion in this brief we have looked into the character of the original concessions and believe that the case at bar will be decided upon the questions heretofore discussed, but we will now consider this case upon the theory that neither of the claimants had any rights or equities of any character whatsoever under the Mexican Government. In this view of the case, in the language of the Court in Miller *vs.* Dale, 92 U. S., 474, "we must seek a solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined." This case also tells us what proceedings had before our tribunals and officers are essential in order to convey title. At page 476 the Court says:

"In this condition of the property the party who first obtained a confirmation of his claim, and its definite location by an approved survey took the title to the land embraced by the survey."

It would appear, therefore, that, viewed as American titles, the case at bar would be determined upon the question as to which of the grants received the first confirmation and was also definitely located by an approved survey. We will endeavor to show that the Beck grant not only was the first surveyed, but also that its confirmation was the first to become effective.

A.

An approved survey was essential to the attaching of the confirmation and the Beck Grant was the first to obtain an approved survey.

The boundaries of both the Beck Grant and the Perea Grant were described in the original documents and in the report of the Surveyor-General of the Territory by reference to natural objects. In the case of the Beck Grant, natural objects on the four sides were given, whereas, in the case of the Perea Grant, a natural object was taken as an initial boundary point and from it all the other boundaries were to be ascertained by survey. On principle, therefore, they were of the same character as to description of the property. The first question which arises is, was a survey of these grants necessary in order to segregate them from the public domain and pass title from the United States, considering such titles wholly as American titles. This question was fully discussed in the case of Stoneroad *vs.* Stoneroad, 158 U. S., 241. At page 246 in the opinion of the Court, we find the following:

"The first and fundamental question is, did the Act of Congress of 1860 which confirmed the claim of Preston Beck, jr., as recommended by the Surveyor-General, provide for, or by necessary intendment contemplate that a survey of the grant should be made in order to separate the land embraced within it from the public domain?"

The Court then proceeded to discuss the general laws of the United States relating to the survey of public domain and all private land claims. The Court at page 250 says:

"It is not to be presumed that Congress intended, by confirming a grant which had never been surveyed, and had, therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation, especially when this

survey was fully provided for by the general law, in accordance with the uniform public policy of the government in dealing with questions of this character. The general rule being to exact a survey, the grant here under consideration could only be exempted from this requirement by an express statement in the Act of Congress indicating an intention to depart from the rule in the particular instance. No such intention is anywhere expressed in the confirmatory Act. Indeed, the idea that the Act, whilst confirming the title, did not contemplate a survey for the purpose of marking its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter. Construing, then, the confirmatory Act, in connection with the general law of the United States, the recommendations of the Surveyor-General upon which the confirmation was made and the essential requirements of the case as presented to Congress, we conclude that a survey of the grant was contemplated by the confirmatory Act, and we will determine the rights of the parties in accordance with this conclusion. * * * In other words, if it be conceded that there is no survey, the plaintiff is without right to relief, since *a survey was essential to carry out the confirmatory Act.*"

We also refer to the following cases as supporting the same doctrine: Bryan *vs.* Forsythe, 19 How., 336; Shaw *vs.* Kellogg, 170 U. S., 341; Langdeau *vs.* Hanes, 21 Wall., 531; Rutherford *vs.* Green's Heirs, 2 Wheat., 206.

It will thus appear that a survey was essential under the confirmatory Act to segregate the land from the public domain, and that when such survey was had, the confirmation immediately attached, and title to the specific land became vested. The survey of the Beck Grant was made and approved in the year 1860. The survey of the Perea Grant was not made until the year 1871, so that for a period of eleven years before the Perea Grant was surveyed and before the confirmation of the Perea Grant could attach to any definite tract of land, the Beck Grant had been surveyed, and the land in controversy in this suit had been segregated

from the public domain, and therefore, at the time of the survey of the Perea Grant, there was no jurisdiction in any officer of the United States to affect the title to those lands *because they were not at that time lands of the United States.*

From the date in 1855 when Preston Beck, jr., filed his petition with the Surveyor-General for the confirmation of this grant until the approval of the survey pursuant to the confirmation of the grant, these lands were held *sub judice* for the purpose of satisfying the claim of Preston Beck, jr., should the same be confirmed by Congress. When this claim was surveyed and such survey approved by the proper authorities, the confirmation of the grant at once attached and the United States no longer had jurisdiction over the same for any purpose. When the officials of the Government more than ten years afterwards undertook to survey the boundaries of the Perea Grant, so far as such survey encroached upon the boundaries of the Beck Grant, they were trespassers. The situation at that time was analogous to the one discussed by this Court in the case of United States vs. Conway, 175 U. S., 67. In that case Congress had confirmed a grant to an Indian pueblo. After the creation of the Court of Private-Land Claims, an application was made to that court by Conway for the confirmation of a grant the greater portion of which lay within the boundary of the previously confirmed pueblo grant. It was insisted that, notwithstanding the previous confirmation to the pueblo, the Conway claim should be confirmed subject to the rights of the pueblo; but his Court declined to take such action and in doing so said:

"The Government having thus exhausted its power with reference to the land is dispute by granting all its title as sovereign proprietor to the pueblos, it is difficult to see upon what principle it is called upon to make or confirm another grant to a different person. * * * It is true that the act of December 22, 1858, confirming these lands to the pueblos may have been itself void by reason of petitioner's prior title thereto; but that is a question which is not neces-

sarily involved in this case and upon which we express no opinion. It will occasionally happen that the Government through accident or inadvertence will patent the same land a second time; but when its attention is called to the fact that the land has been previously patented it cannot patent the same land a second time without virtually stultifying itself. A patent assumes that a patentor has certain rights to convey, and if those rights have already been conveyed with the knowledge of the grantor, a second patent carries with it a suspicion of a want of good faith."

B.

The confirmation of the Beck Grant was legally prior to the confirmation of the Perea Grant.

Congress by an act of 1854 created the office of Surveyor-General for the Territory of New Mexico.

Under this act it was made the duty of the Surveyor-General under such regulations as the Secretary of the Interior might prescribe, to ascertain the nature and extent of private land claims in New Mexico and report the same together with his approval or disapproval for the action of Congress. The Secretary of the Interior through the Commissioner of the General Land Office specified the method of procedure which should be adopted in the examination of these claims. Among other things these regulations required as stated in the letter to the Surveyor-General from the Commissioner of the General Land Office the following:

"You will commence your session by giving proper notice of the same in a newspaper of the largest circulation in the English and Spanish languages, and will make known your readiness to receive notices and testimony in support of the land claims of individuals derived before the change of government. You will require claimants in every case, and give public notice to that effect, to file a written notice setting forth the name of 'present claimant,' name of 'original claimant,' nature of claim, whether inchoate or perfect, its date, from what authority the original title was derived, with a reference to the evidence of the power and authority under which the granting officer may have acted, quantity

claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim and to show a transfer of right from the 'original grantee' to 'present claimant.'"

It will thus be seen that in order for anyone to have a land claim approved and subsequently acted upon by Congress it became necessary for such claimant to file a notice of his claim with the Surveyor-General of New Mexico. If this proceeding should result in securing title to the land from the United States by a claimant, the filing of this notice would be the first step in the proceeding. Without such notice title to the land could not be derived from the United States by any applicant or claimant. This court in the case of Astiazaran *vs.* Santa Rita Mining Company, 148 U. S., 84, said:

"In this case Congress has constituted itself the tribunal to finally determine upon the report and recommendation of the surveyor-general whether the claim is valid or invalid. *The petition to the surveyor-general is the commencement of proceedings* which necessarily involve the validity of the grant from the Mexican government under which the petitioners claim title; the proceedings are pending until Congress has acted; and while they are pending the question of the title of the petitioners can not be contested in the ordinary courts of justice."

In the case of Stoneroad *vs.* Stoneroad, 158 U. S., 243, wherein the title of the Beck Grant was considered by this Court in connection with the survey thereof, it was said:

"The controversy *initiated* before the surveyor-general by the filing of this petition was decided by him in 1856."

The notice for the Peres Grant was not filed until 1857. This grant was subsequently favorably reported by the Surveyor-General and both claims were confirmed by the act of Congress of June 21, 1860, the Beck Grant being No. 1 and

the Perea Grant No. 16. Under this state of facts we assert and will attempt to show that the confirmation of the Beck Grant thus obtained was in legal effect the first confirmation and prior to the confirmation of the Perea Grant.

This general doctrine is defined in the case of Landes vs. Brant, 10 How., 372. In that case the court was discussing the time when the confirmation of a grant should take effect. The petition for the confirmation had been filed in 1805, the grant confirmed in 1811 and the patent issued in 1845. Between the date of the filing of the claim in 1805 and its confirmation in 1811, the land had been sold by the Sheriff under execution according to the laws of Missouri. Prior to the confirmation, the claimant did not have a legal title. The court held that the confirmation and patent took effect by the doctrine of relation as of the date when the claim was filed in 1805. The court discusses and applies this doctrine as follows:

"The imperfect title as then filed was subject to seizure and sale by execution; the ultimate perfect title demanded and granted was a confirmation and sanction by the political power of the imperfect title, and gave it complete legal validity; and to protect purchasers the rule applies, 'that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation'—as stated in Viner's Abr., tit. Relation, 290. The doctrine of relation is well illustrated in Jackson *vs.* M'Michael, by the Supreme Court of New York, 3 Cowen, 75, and recognized by the Supreme Court of Missouri, in the case of Crowley *vs.* Wallace, 12 Mo., R. 145.

"Cruise on Real Property (Vol. V, pp. 510, 511) lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason and convenience than this, *that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate fro mthe substantial part by relation.*'

"For the purpose of this case, (without proposing to apply the rule to every other,) we may assume that the first act of Clamorgan was that of filing his title papers and

claim with the recorder of land titles, according to the fourth section of the act of March 2, 1805; this was regularly done and the papers recorded. He claimed under the second section of the act of 1805, which was amended by the act of April 21, 1806, and again by the act of March 3, 1807. As already stated, by the fourth section of this last act, the decision of the board of commissioners appointed to investgate such claims is made final against the United States and he was entitled to a patent. His claim was fully within the provisions of the acts of 1805 and 1807.

"Applying the doctrine of relation and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811, and the patent of 1845 must be taken to relate to the first act; that of filing the claim in 1805."

In the case at bar, if the ttiles are to be considered solely as American titles; that the United States had absolute title to the land and that the acts of presenting the claims to the Surveyor-General, and subsequent confirmation by Congress were to operate as a deed from the United States to the claimants, then, the vital question is, when did the conveyance become effective? What were the necessary parts and ceremonies entering into this conveyance? In other words, what elements combined constituted a deed in this case? In the case of Landes *vs.* Braht, *supra*, it was held by the court that the filing of the claim was an essential element, and of course, the confirmation was another essential element. These two ceremonies the court said should be taken together as one act and operate from the date of the first. In the case at bar the confirmation would not have been obtained except for the filing of the notice with the Surveyor-General of the Territory. Such filing was an essential proceeding in order to obtain title from the United States. The proceedings in the case cited all taken together constituted a conveyance from the United States and had the same effect as if the United States had executed a deed for the property. So in the case at bar the filing of the notice with the Surveyor-General and the confirmatory act together constituted

and operated as a deed from the United States upon the approval of the survey, and under this decision the deed took effect by relation as of the date when the claim was filed with the Surveyor-General.

Beard *vs.* Federy, 3 Wall., 491, specifies two aspects in which a confirmation of a grant must be construed. The Court there says:

"Their position rests upon a misapprehension of the character and effect of the patent issued upon a confirmation of a claim to land under the laws of Spain or Mexico.

"In the first place, the patent is a deed of the United States. As a deed its operation is that of a quit-claim or rather of a lonveyance of such interest as the United States possessed in the land and *it takes effect by relation at the time when the proceedings were instituted by the filing of the petition before the Board of Land Commissioners.*

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. * * * By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described."

This second aspect, as just above stated by the court was the one in which these confirmations were considered under the first general division of this brief. It is under the first aspect as stated in this decision that we are now considering this title. The confirmation, according to this authority, in this aspect, is to be viewed as a deed from the United States conveying such interest as the United States possessed in the land, and under this authority the confirmation of the Beck Grant as well as that of the Perea Grant took effect as a deed as of the date when the claims respectively were filed with the Surveyor-General. In other words, that date is to be considered the date of confirmation. And the

only logical result is, that *the Beck Grant was the first confirmed.* The case of Hamblaw *vs.* Bissell, 18 Wall., 265, considered the same two propositions. The case as heretofore shown was decided by looking behind the confirmations to the rights of the parties under the laws of Mexico, but the court also views the effect of the confirmation, considered in the light of a deed from the United States, and at page 265 says:

"The patent treated merely as a deed of the government is held in those cases to have the operation of a quit-claim, or rather of a conveyance of such interest as the United States possessed in the land, and to *take effect by relation at the time when the proceedings were instituted before the Board of Land Commissioners.*"

In the case of Grisar *vs.* McDowell, 6 Wall., 379, the Court says:

"Whoever obtain conveyances from the city or assert title under the Van Ness Ordinance whilst the claim of the city to the land thus conveyed, or to which the title was thus asserted, was pending before the tribunals of the United States, necessarily took whatever they acquired subject to the final determination of the claim. Their title stood or fell with the claim. If the decree took effect by relation as of the date when the petition of the city was presented to the Board of Land Commissioners, it is to be treated in legal effect, as if entered on that day."

The Court then cites the case of Landes *vs.* Brant, 10 How., 373. So, after the claim for the Beck grant was filed with the Surveyor-General and pending final action upon it, no other person or persons could acquire any right or interest in or to the land invoived in that claim until it was finally passed upon, and when finally passed upon, the action would relate back to the time of filing the claim with the Surveyor-General.

The discussion of this proposition by the Supreme Court of New Mexico in its decision (R. P. 72-73) appears to the writer to be much more confusing than convincing. The assumption is made that the claimants to each of the two grants had no title whatsoever other than was obtained from the United States, and that being so the confirmation could not in any event relate back to the proceedings under the former government. In support of this position reference is made to the case of Dent *vs.* Emmeger, 14 Wall., 312. This conclusion by that court is self-evident, and no contention to the contrary was made by the claimants of the Beck Grant. The proposition for which we contend is, if it be conceded that no rights whatsoever were acquired under the former sovereign, by the doctrine of relation the confirmation by Congress and the subsequent approved survey related back to the initiation of the proceedings for the acquirement of this title from the American officials, which was the filing of the notice of the claim before the Surveyor-General. The case of Dent *vs.* Emmeger has no application whatever to this proposition. The claims referred to in that case were, from their inception, dealt with as imperfect claims such as gave no rights either in law or equity as against the former sovereign and which appealed only to the conscience of the United States. The Act of Congress contemplated the conferring of American title. No reservation of the rights of third parties was made. In this condition of the titles the Court rightfully held that he who secured the first confirmation obtained the title.

The court below refers to the Act of Congress of July 22, 1854, which created the office of Surveyor-General for New Mexico, and said that this act did not even provide for applications to the Surveyor-General, and apparently intends to say that the only authority conferred upon the Surveyor-General was restricted to that part of the statute which made it his duty "under the instructions of the Interior Department to ascertain the origin, nature, character, and extent of all claims to land under the laws, usages, and customs of

Spain and Mexico." The court in its decision (R .P. 73) quotes a paragraph from the instructions given by the Secretary of the Interior to the Surveyor-General, and only reaches the result that this order was not effective to give rights which the law did not give. It is apparent that the court failed to properly consider that Act of Congress, and overlooked section 9 wherein it was enacted:

"That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act."

Under the statute it was the duty of the Surveyor-General to investigate all claims to lands in New Mexico under former sovereigns. He was empowered to administer oaths and examine witnesses. It was his duty to consider both the facts and the law and render a decision thereon. It was his duty after such determination to report the claims for submission to Congress for its final action, but the Surveyor-General decided the case in the first instance. With such duties to be performed, it was essential that rules and regulations should be provided for carrying this act into effect. The Secretary of the Interior very properly promulgated such rules and regulations, which provided that the claimant should file a notice with the Surveyor-General setting forth in detail the nature, extent, etc., of his claim. No other appropriate procedure could have been devised, and when these regulations were promulgated they had the same force and effect as if enacted in the statute.

The next contention of the New Mexico court was that the decision of this Court enforcing the doctrine of relation in cases coming before it from California under the act of 1851 had no application to the case at bar for the reason that the procedure under the two statutes was not the same. No attempt, however, is made to show any distinction founded upon any legal or equitable principle. The method whereby claims to such lands should be confirmed was a matter rest-

ing wholly with Congress. Congress could provide for investigation and determination by the judicial department, or could by any act of its own recognize the foreign titles. In whatever manner under authority from Congress such claimants have ultimately obtained titles, the doctrine of relation has always been applied whenever necessary to protect the rights of the claimant, and in each instance the title when acquired has been held to relate back to the initiation of the claim. In the case of Landes *vs.* Brant, 10 How., 371, the confirmation and patent was held to relate back to the filing of the petition accompanied by title papers with the Recorder of Deeds. The decision of this Court in Grisar *vs.* McDowell, 6 Wall., 375, held that an Act of Congress confirming a grant related back to the filing of the petition before the commissioners of California. In that case proceedings were had before the commissioners and were pending in the Circuit Court of the United States when Congress by a confirmatory act decided the case, and in a contest between adverse claimants of lands involved in this confirmation it was held that the confirmatory act related back to the filing of the petition before the California commissioners.

By analogy, the same legal principle is evolved from various decisions in which only American titles were considered. Such were the cases of Stark *vs.* Starrs, 6 Wall., 418. and Shipley, et al., *vs.* Cowan, et al., 91 U. S., 337. It has ever been held that, as between persons claiming titles to lands under the laws of the United States, he who first initiated his claim, whether by settlement, location, entry, or otherwise, ultimately obtained the title, and that such title when obtained related back to the initiaton of the claim.

If the procedure established under the act of 1854 creating the office of Surveyor-General for New Mexico shall be considered as a method of obtaining an American title to lands of the United States, the claimants of the Beck Grant would still be entitled to the land in controversy. In such view of the law, the claim would be initiated by filing the petition or notice with the Surveyor-General, and upon the confirma-

tion by Congress and the approval of the survey a complete equitable title would become vested in the petitioner taking effect as of the date when the petition was filed. The Supreme Court of New Mexico says that this construction ought not to be sustained because it would give an advantage to the person who happened to reside nearest the office of the Surveyor-General. This argumnt might be sufficient to suggest solicitude for the claimants of the Perea Grant, who admittedly had no right whatsoever to the land, and yet not be convincing as to any legal or equitable principle involved. If the statute is to be viewed in this light, he who is first in time is first in right.

CONCLUSION.

Upon the foregoing argument appellant submits it is shown that the claimants of the Beck Grant had a legal title to the land in controversy under the laws of Mexico, or in any event, a better title to such land that the claimants of the Perea Grant. If neither of said claimants had any right, legal or equitable, under the laws of Mexico to such land, then the claimants of the Beck Grant have obtained the title under and by virtue of the proceedings before the officials of the United States and the act of confirmation. If this Court shall concur in these views, the decree of the Supreme Court of New Mexico should be reversed and the cause remanded to that court with a direction to enter a decree confirming the right of the Receiver to the possession of the land in controversy, and dismissing the petition of the intervenor, the St. Louis Land and Cattle Company, filed by it in the partition proceedings pending in the District Court of San Miguel County, New Mexico, wherein George W. Stoneroad, et al., are complainants, and William P. Beck, et als., are defendants.

Respectfully submitted,

ANDRIEUS A. JONES.
Attorney for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

ANDRIEUS A. JONES, RECEIVER, Appellant,
vs.
ST. LOUIS LAND AND CATTLE CO, Appellee. } No. 203

Appeal from the Supreme Court of New Mexico

STATEMENT.

The question to be decided in this case concerns the title to a tract of land in Guadalupe County, New Mexico, and the Perea Grant as they have been surveyed and patented by the United States. The claim of the appellant is that the tract is a part of the Beck Grant and that the owners of the Perea Grant have no interest in it. The Supreme Court of New Mexico decided that the rights of neither of these grants to this tract in conflict was superior to that of the other and that the tract should therefore be divided equally between the two. Appellant bases his claim to the land in question principally upon the contention that the Preston Beck Grant was a complete and valid grant under Mexican law, that its title was perfect at the time of the treaty of Guadalupe Hidalgo and that there was no re-

cessity for confirmation or patent by the United States. He claims under a Mexican, not under an American, title.

He also contends that even if his position as above stated is unsound, still the owners of the Beck Grant have the better right to this overlap because of certain equities which he says exist in their favor, both under the Mexican and the American law.

The Preston Beck Grant had no validity under Mexican law, for the reason that the Political Chief had no authority to make it.

Obviously the first question for discussion in this case is the character of the original title to the Preston Beck Grant. Was it a perfect grant, as claimed by appellant, or was it wholly void as claimed by appellee?

The grant was made on the 23rd day of December, 1823, by Bartolome Baca, then Political Chief of New Mexico, with the consent of the Provincial Assembly. Its validity depends, therefore, on the power of those authorities to make such a grant under the laws of Mexico as then existing. Its invalidity has been twice decided by the Supreme Court of New Mexico, once in the case of *Pino et al* v. *Hatch*, 1 N. M. 125, and the second time in the present case. (Transcript p. 63), *Stoneroad* v. *Beck*, 16 N. M. 754; 120 Pac. 898.

We contend that the grant was wholly void for the following reasons:

First, Because the Political Chief was never authorized to make grants of the public lands of Spain or Mexico.

Second, Because if such authority ever existed it ceased on February 24, 1821, when Mexico achieved her independence.

Third, Because if such authority ever existed it was abrogated by the imperial colonization law of January 4, 1823.

The Political Chief was never authorized to grant the public domain of Spain or Mexico.

By the royal decrees of 1754 and 1786 the Empire of Spain in Mexico was divided into twelve Intendencias, to-wit: Sonora and Sinaloa, Durango, Zacatecas, Guadalajara, San Luis Potosi, Guanajuato, Valladolid, Mexico, Oaxaca, Puebla, Vera Cruz and Merida, besides the three provinces of New Mexico, Antigua California and Nueva California.

Bancroft's History of Mexico, Vol. 3, page 455.

And the Spanish Empire remained so until the end of Spanish domination.

Bancroft, Vol. 3 page 455, *supra*.

Sheldon v. *Milmo*, 29 S. W. 832-34.

Reynolds, in his Spanish and Mexican Land Laws, at pages 27 and 28, also divides the Spanish Empire in America into the same Intendencias.

When Mexico was under the dominion of Spain the exclusive authority to make a grant in fee to the soil was, from the date of the royal ordinance establishing the intendencias in 1786, in the intendants of the respective intendencias created by that ordinance and so continued during such dominion until the Mexican Independence.

Sheldon v. *Milmo*, 29 S. W. Rep. 832-33.

The Intendants in Mexico were the exclusive judges

on questions touching the public domain, and all persons petitioning for new grants of land were required to present them to the Intendant for confirmation.

2 *White* 67-71.

Such power certainly was never conferred upon a political chief or governor under any Spanish law or decree, and did not exist prior to the colonization law of 1824. Neither the royal decree of December 1786, nor any subsequent decree of the Cortes, order or cedula of the King, nor any decision of the courts, either state or federal, supports the contention that a political chief ever had authority to grant the public lands of Mexico while under Spanish dominion. On the contrary it has been often authoritatively affirmed that no such power was ever vested in a political chief.

Jones v. *Garza*, 11 Tex. 186-207.
Jones vs. *Muisbach*, 26 Tex 236-238.
Sheldon vs. *Milmo*, 29 S. W. 832-34.

In *Jones* vs. *Muisbach*, 26 Tex. 238, *supra*, the Supreme Court of Texas, at a time and under circumstances which made the research of Spanish and Mexican land titles and the powers of Spanish officials in Mexico a subject much less arduous of investigation than it now is, held:

"The political chief is an officer of well known powers and functions under the Spanish and Mexican systems of jurisprudence. The extent and limits of his official duties, whether under the laws of the King of Spain, the constitution of the Cortes, the government of Mexico, whether imperial, federal or central, were substantially the same and were well and plainly defined. But we can find nothing either in the laws prescribing his

duties or in the nature and character of the business entrusted to his charge from which the slightest inference can be drawn that he was ever at any time under any of these different systems authorized to grant lands, unless he had authority to do so expressly delegated to him."

In the case at bar there is no evidence that such authority was ever *expressly* delegated to the political chief Bartolome Baca, and if there was such express authority as a matter of course it was incumbent upon the appellant herein to have shown it.

The treaty of Cordova, August 24, 1821, providing that "the provisional junta is to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala and until the Cortes shall form the constitution of the state" and the "Plan of Iguala," which "habilitated and confirmed all authorities as they now are in conformity with the plan of Iguala and the treaty of the Village of Cordova for the purpose of legalizing the exercise of their respective functions," created no new officials and vested no powers in Spanish officials which they theretofore did not possess.

The political chief never having had the power to grant lands of course received no such power from either the treaty of Cordova or plan of Iguala.

Appellant herein cites the case of *United States* vs. *Peralta*, 19 How. 347-48, as an authority of this court to the effect that a grant to Luis Peralta, in California, made by Governor Sola on the 18th day of August, 1822, after the Mexican independence and prior to the Mexican colonization law of 1824, was a complete grant in fee, or perfect grant. In that case the question whether the grant made by Gov. Sola to Luis Peralta in 1822 was perfect or imperfect, was entirely immaterial and

that point was not before this court for adjudication; and thereafter the Supreme Court of California in *Banks* v. *Moreno*, 39 Cal. 233, wherein that court had the exact point presented as to whether the grant to Luis Peralta by Governor Sola was a *perfect grant* said:

"It is further claimed, that the question has been directly adjudicated by the Supreme Court of the United States in the case of *The United States* v. *Peralta* (19 How, 340)—in which case the claim of the sons of Peralta for confirmation of their title to said rancho was before that Court on appeal. In delivering the opinion of the Court, Mr. Justice Grier said: 'The grant of Sola of a portion of the tract, of which Peralta had been originally put in posession, is a complete grant in fee of that portion;' and the plaintiff claims that the premises in controversy are included within that portion granted by Sola, and of which Peralta had been orignally put in possession. Hence, it is insisted that this is an authoritative decision, directly on the point, that Peralta had 'a complete grant in fee" of those particular premises; and we infer that the District Court so interpreted it. But in that case a confirmation was sought by the sons, not only of the title derived from Governor Sola, but also under a grant of a part of the tract from Governor Arguello, and under a subsequent alleged grant of the whole by Governor Micheltorreno. It is evident in the case that, whether the grant from Sola was a complete grant in fee, or only the grant of an inchoate title, the title of Peralta—founded not only on that, but also upon the subsequent grants from Arguello and Micheltorreno, and accompanied by a continuous possession, commencing as early as the year 1820—ought to be confirmed. It is evident the Supreme court took that view of the case, and deemed it wholly immaterial whether the grant by Sola conveyed a perfect or only an inchoate title; because immediately following the paragraph we have quoted, the opinion proceeds to say: 'But it is of little importance to the decision of the case whether it conferred only an

inchoate or equitable title, connected with an undisputed possession of thirty years, and confirmed aagin in 1844 by the order of the Governor of California—its claim for protection, under the treaty with Mexico, cannot be doubted, notwithstanding its want of confirmation by the Departmental Assembly.' The declaration, therefore, that the grant of Sola was a complete grant in fee, was the statement of a proposition not necessary to the adjudication of the case, and not essential to the rights of the claimants; and the result would have been the same if that proposition had been wholly omitted from the decision, or even if it had been reversed and the Court had held that the title derived under the grant from Sola was only an inchoate, equitable title, and not a grant in fee. The statement of the proposition, therefore, must be regarded only as the *dictum* of the judge who wrote the opinion, and not as an adjudication of the Court."

And in *Carpentier* vs. *Montgomery*, 13 Wall 480-93, this court in considering this same title of Luis Peralta in a cause wherein the court adjudicated the question whether the grant to Luis Peralta was perfect or imperfect after quoting approvingly from *Banks* vs. *Moreno*, *supra*, held that "the title to Luis Peralta was an *imperfect* title and necessarily required confirmation in order to vest a full legal estate in private parties."

The court reached this conclusion because of the fact that the grant to Peralta was not sufficiently identified by the description of the land within its boundaries, and Justice Bradley in delivering the opinion of the court in *Carpentier* vs. *Montgomery*, which reviewed the case of *United States* vs. *Peralta*, said:

"In that case the court intimated an opinion that the title was perfect for at least a part of the rancho* * * * * * *, but the point was not material in the case, because clamaints were equally entitled to a confirma-

tion, whether their father's title was perfect or imperfect, legal or equitable; so that the intimation was nothing but an *obiter dictum* of the judge who delivered the opinion."

It therefore appears that this Court has never in any case affirmed the doctrine that the Governor of California or of any other Mexican state or Mexican province had the power to make grants of land prior to the Mexican colonization law of 1824.

The Spanish system of disposal of Crown lands was abrogated by the Independence of Mexico.

The independence of Mexico dates from February 24, 1821. On that date the Kingdom of Spain lost its jurisdiction over what is now New Mexico, and the sovereignty of the Mexican Nation commenced. Prior to that date the title to all lands in New Mexico not held in private ownership was vested in the King of Spain, who had the right of disposing of them according to his wish, and to whom he pleased. His power in this respect was absolute and unlimited. At different times he promulgated different rules by which he could be divested of his title, entrusting the duty to various officers as his agents.

On the 24th day of February, 1821, the title to these lands which had been vested in the King of Spain passed to the Mexican Nation. The various subdivisions of that nation, whether they came to be called provinces, territories, departments or states, never took title to any of the land nor had any right of disposition over it unless by some grant of power from the nation. The province of New Mexico had no such power. The central government of the United States gets its powers from the several states. The contrary is true in Mexico.

There the states have received their powers from the central government. This distinction is pointed out in a number of decided cases, all holding that title to public lands vested in the Mexican Nation. Among them are the following:

Republic v. *Thorn*, 3 Tex. 499.
Good v. *McQueen's heirs*, 3 Tex. 241.
U. S. v. *Coe*, 171 U. S. 681.
U. S. v. *Hartwell's heirs*, 22 How. 288.

In *Leese* v. *Clarke*, 3 Cal. 16 the Court says:

"Prior to the Mexican revolution which produced the Plan of Iguala, February 24, 1821, the unappropriated land in this country constituted a part of the domain of the Spanish monarchs, who alone represented and exercised the sovereignty of the Spanish nation. The royal governors were the mere deputies of the king, and exercised the sovereignty in his name.

His will, manifested in the form prescribed by his regulations, operated as a valid alienation of the public domain. His governors, acting under his authority and in his name, were the mere executors of his will—whence the law or decrees of the kings, and the regulations and usages of their governors, sanctioned by royal approval or acquiescence, afforded the proper tests by which to determine the validity of grants of land belonging to the nation whose sovereignty those kings represented and exercised, and they are accordingly consulted and relied upon by the Courts of the United States in adjudicating Spanish claims in Florida and Louisiana. But on the 24th of February, 1821, the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico, except by an act of Mexican sovereignty. The royal decrees, regulations, and usages, ceased to have any effect whatever as to subsequent grants of land.

This point was determined by the Mexican Congress, in a case which arose shortly after the independence of that government, and has ever since been acquiesced in. On the 17th day of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas. On the 19th of August the Mexican governor of that province, (Martinez), assuming the powers properly exercised by the royal governors, modified the grant in favor of the younger Austin.

Had the royal laws and usages still continued to retain their force, the acts of Martinez would have been valid, but the Mexican government, at the same time it recognized the act of the royal governor as valid, because done before the change of sovereignty refused to confirm the act of its own governor, done after the change, on the ground that the sovereignty could be exercised only by the Mexican nation. The subject attracted public attention, and the Mexican Congress were about passing a general law in relation to the alienation of public lands, when Iturbide forcibly dispersed the members of that body and caused himself to be proclaimed emperor."

And the same rule is laid down by the Supeme Court of New Mexico, as applicable to this very Preston Beck Grant, in *Pino* v. *Hatch*, 1 N. M. 125, where the court says:

"It has been conceded in the argument of this cause (and the discussions have been able and luminous), that the territory in controversy was public domain, and belonged to the sovereignty of Mexico when Baca executed the documents. The court takes notice that the United States acknowledged the independence of Mexico, which had been achieved from Spain in 1821. Up to that time, the royal order of the king, by virtue of his prerogative, ruled absolutely in the disposition of the public domain, and in the separation thereof, and in the granting of parcels to individuals. Upon the assertion of these prerogatives in Mexico the power passed to the sovereignty of

the latter country. The supeme court of the United States said, in the case of *Pollard's Lessee* v. *Hagen et al*, 3 How. 225, asserting the law of nations:

'It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive, or power to exercise them. Every nation acquiring territory by treaty or otherwise, must hold it subject it to the constitution and laws of its own government, and not according to those of the government ceding it.'

It follows, then, that all power which governors of provinces, intendants, or other persons had to dispose of public domain, by virtue of authority imparted by the king of Spain, ceased upon the independence of Mexico. The sovereignty over the public domain passed from him to the sovereignty of Mexico. The title passed there, and lodged there, and could not be divested without an authority and under a law. Neither a political chief nor a provincial governor could divest the sovereignty of the soil unless expressly authorized by the new power to do so, or his acts should be subsequently sanctioned by the political authority: See *Jones* v. *Borden*, 5 Tex. 410. Bartolome Baca, if he had the power to grant the title to the premises in question, derived that power from Mexico, for New Mexico at that time was governed as a part of that nation. And, as before remarked, the argument of the cause has proceeded upon the conceded ground that the sovereignty of the public domain in the province was in Mexico. No one has urged that this domain had become the property of the province, and could have been divested without the authority of Mexico."

Title being vested in the central government, it could only be divested by some action of the government. While it is true that the laws of a conquered country remain in force after its conquest, and those governing a

subject nation continue after its independence, this general doctrine does not apply to rules laid down by a sovereign for the disposition of its public domain. When title passes to the new sovereignty it alone has authority to determine how its property shall be disposed of.

In *Moore* v. *Steinbach*, 127 U. S. 70, this court says:

"The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject."

The Plan of Iguala did not continue the Spanish system in force.

It is contended on behalf of the Preston Beck Grant that a sufficient grant of power by the new sovereignty is to be found in the Plan of Iguala an the subsequent action of the provisional council continuing the authority of the persons then holding office, and the case of *Ely's Administrator* v. *United States*, 171 U. S. 220, is cited in support of that contention. A reading of the Plan of Iguala and the rule promulgated by the council (which may be found in the Ely case, supra), will show that they were simply a declaration by the new sovereign of its intention to continue temporaily in force the existing officials, an intention that would have been implied in any event, for the contrary rule would result in a con-

dition of anarchy. But not a word is to be found in them touching the disposition of the lands belonging to the nation, and it is hardly to be presumed that the new government would entrust such power to persons of whose loyalty it could not be certain. The Ely case is not authority for any such doctrine as is claimed for it. That case decided the character of a grant which had been sold by the Spanish Intendent, his action ratified by the promoter fiscal, a Mexican officer, the purchase money paid into the National Treasury of Mexico, and presumably devoted to public purposes. Four years after the date of the sale, in 1825, an officer of the Mexican Treasury again reviewed the proceedings, executed the proper title papers and therefore confirmed what had been done by the Intendent whose power was doubtful. Under these circumstances, and considering the acceptance by the Mexican government of the purchase money and the subsequent confirmation of the proceedings by its officer, this court says that "this grant was one which at the time of the cession in 1853 was recognized by the Government of Mexico as valid, and therefore one which it was the duty of this Government to respect and enforce." The Supreme Court does not say that the Mexican officer who made the grant had authority to do so, nor that his action was originally valid. It declares only that the grant was one recognized as valid by Mexico at the time of the cession, and that our government should also respect it. The decision rests upon the doctrine of ratification by the new sovereign.

> *The validity of the grant was by this Court distinctly referred to the Mexican proceedings had thereon subsequent to the Mexican Independence.*

There is no similarity between the grant there discussed and the Preston Beck, and none of the considerations moving the court to that decision exist in the present case. The Supreme Court of New Mexico says in *Pino* v. *Hatch*, that the actions of the Political Chief would be valid if they "should be subsequently sanctioned by the political authority" and the Supreme Court of the United States in the Ely case practically lays down the same rule.

The decision of this court in the case of *Ely's Administrator* v. *U. S.*, the effect of the Plan of Iguala, and the rule laid down in *Moore* v. *Steinbach*, are all discussed and harmonized by the Supreme Court of New Mexico in its opinion in the pesent case (Transcript 63).

If, then, this court had before it nothing more than the fact that there had been no affirmative action by the Mexican government authorizing the Political Chief to make this grant, it would be incumbent upon the court to declare that his action was wholly without authority and conferred no title, his powers over the public lands having ceased on the independence of Mexico.

The Spanish system was abolished by the Colonization Law of 1823.

But even admitting, for the purpose of argument, that the Political Chief of New Mexico had power to grant lands under the King of Spain, and that such power continued after the Mexican Independence, still that authority necessarily ended on the passage of the colonization law of the Emperor Iturbide in 1823.

Augustin Iturbide was declared by Congress, Empero rof Mexico, May, 1882, and crowned July 21st of that year. His government was overthrown April 7, 1823. During the period between those dates the sov-

ereignty of the Mexican Nation was in him as Emperor, and, perhaps in the Junta Instituyente, the members of which he nominated, after the Congress was dissolved. On April 6, 1822, the Secretary of State of the United States wrote to the Spanish Minister notifying him that the United States had recognized the independence of Mexico, and that America would entertain reciprocal, political and commercial relations with that country (Annals of Congress, No. 39, seventeenth Congress, 1821-1822, pages 2099 and 2125).

On December 14th, 1822, Jose Manuel Zoyaya was presented by the Secretary of State and received by the President of the United States as Envoy Extraordinary and Minister Plenipotentiary from the Emperor Iturbide. Our courts, therefore, cannot deny that Iturbide's government was valid, nor can they refuse to recognize laws promulgated by him on the ground that he was an usurper. This is entirely a political question, has been settled by the Political Department of the Government, and the decision of that Department is binding upon the courts.

Jones v. *United States*, 137 U. S. 202.
In *re Cooper*, 143 U. S. 503.

While Iturbide was Emperor and nearly a year before the Political Chief attempted to make the Beck Grant, namely on the 4th of January, 1823, the Junta Instituyente passed, and the Emperor approved, the first colonization law of Mexico. It may be found partly set out in *Cessna* v. *United States*, 169 U. S. 165. By its terms the power of granting lands is given to the executive, in other words, reserved to the Emperor himself. Ayuntimientos had certain powers of distribution, but only in conformity with instructions from the executive.

This law grants no right of alienation to the Governors or Political Chiefs, and, on the contrary, takes away whatever power they may have claimed theretofore, the last paragraph of the Act being as follows:

"Therefore, we order all tribunals, judges, chiefs, governors, and all other authorities, as well civil as military and ecclesiastical, whatever class or dignity they may be, to comply with this decree, and cause it to be complied with in all its parts; and you will cause it to be printed, published and circulated.—Given in Mexico, 4th January, 1823.—Signed by the Emperor.—To Don Jose Manuel de Herrera, Minister of Interior and Exterior Relations."

Here, then, we have the new sovereign promulgating new rules for the disposition of its public domain wholly inconsistent with the plan adopted by the former government. Those old rules were necessarily immediately abrogated, even though we admit that they had remained in force up to that time.

This colonization law of 1823 has been referred to and recognized as valid in the following cases, among others:

Cessna v. *U. S.*, 169 U. S. 165;
Goode v. *Queen's heirs*, 3 Tex. 168;
Yates v. *Iams*, 10 Tex. 168;
Holliman v. *Prebles*, 1 Tex. 673;
Yates v. *Houston*, 3 Tex. 433.

It will be found set out also in I White's Recopilacion, p. 588 Reynolds on Spanish and Mexican Laws, and Hall's Mexican Law. None of these authorities expresses any doubt as to its validity.

This law of Iturbide was in effect until April 11, 1823, when it was suspended. Its suspension, however,

could not operate to reinstate the methods for the disposition of the public lands that were in force prior to its promulgation. The new sovereign having once declared its unwillingness to recognize the former rules on that subject, and having absolutely abrogated them by the law of 1823, they could be given new life only by some affirmative action of the Mexican Government. To hold otherwise would be to hold that Mexico could be deprived of its public lands without its consent. Furthermore, the intention not to recognize the old rules is apparent from the very act of suspension, which is found in 1 White Recopilacion, p. 594, and reads as follows:

"Decree of the Sovereign Congress.

"Most excellent Sir:—Having seen the reasons which the empresario, S. F. Austin, has given in his last representation, praying that the concession made to him, by the late government, for the establishment of three hundred families in Texas, should be confirmed: The sovereign constituent congress have thought proper to resolve, that the said petition should be transmitted to the executive, in order that should it have no objections, it may grant this petition, and any others of the same kind;—also, the sovereign congress have determined, that hereafter, the colonization law, passed by the Junta Instituyente, shall be suspended until a new resolution on the subject. And by order of the sovereign congress, we communicate this to your excellency, accompanied by the said petition.—God preserve your excellency many years.—Mexico, 11th April, 1823.

FLORENTINO MARTINEZ,
Member and Secretary.

JOSE MARIA SANCHEZ,
Member and Secretary.

To his excellency, the Minister of Interior and Exterior Relations.

The intention of the Mexican Government to adopt "a new resolution on the subject" was not carried out until August 18, 1824, on which date the new colonization law was enacted and remained in force many years. Between April 11, 1823, and August 18, 1824, there was no law or decree by which the Mexican public domain could be transferred to private ownership. Between these dates it was obviously the intention of Mexico to retain the ownership of its lands. It was during this period that the Jefe Politico assumed to give away this large tract, which belonged not to any political subdivision of Mexico over which he had control, but to the central government which had delegated to him no power over it. Under these circumstances it certainly seems futile to discuss the power of the political chiefs under Spanish rule, or the effect of the plan of Iguala as continuing such power. It is sufficient to say that at the time of the making of the Preston Beck Grant there was no rule or law authorizing the granting of Mexican public lands.

It follows that the Preston Beck Grant was made by an officer having no authority, and at a time when no officer was empowered to make it. It was wholly void in its inception, and whatever title its present claimants may have is derived from its confirmation by the Congress of the United States, not from any proceedings under the Mexican government. Its title is, to say the least, no better than that of the Perea grant, and as against that grant there can be no advntage derived from the doctrine of relation nor any constructive possession of the whole of it by reason of any actual possession of a part.

There s no presumtion of authority in favor of the officer making the Beck Grant.

In the brief filed in this court by appellant it is argued that the power of the political chief to make the Preston Beck Grant is to be presumed from the fact that certain officers continued to make grants after the Mexican Independence, and that the making of the grant was ratified by the Mexican Government because not specifically repudiated.

The first of these suggestions is answered by the fact that of the grants made in New Mexico during this period not one has ever been confirmed by a court. Of the ten grants of which we have any record, made in New Mexico between the date of Mexican Inependence and the enactment of the colonization law of 1824, four were confirmed by direct congressional action, and the remaining six were rejected by the Court of Private Land Claims. A list of these grants appears in the opinion of the Supreme Court of New Mexico in this case (Transcript p. 68). Furthermore, these arguments can be used in favor of the validity of the Perea grant quite as well as in favor of the Preston Beck. The fact that these officers continued to claim this power is as persuasive in one case as in the other, and the documents relating to the Perea grant were preserved in the Mexican archives with the same care as those of the Preston Beck. And the same statement applies to the argument in appellant's brief that the Beck grant was held perfect by the Surveyor General and its confirmation recommended to congress. That official made the same decision and took the same action in the case of the Perea Grant.

To maintain his claim that there is a presumption

in favor of the authority of the political chief to make this grant appellant relies upon the case of *U. S.* v. *Peralta,* 19 How. 347. That case bases such a presumption of authority only upon the peculiar language of certain acts of Congress, from which the court concluded, that it was not the intention of Congress that a claimant should be required to offer proof as to the authority of the official executing the grant. Under the act of March 3, 1891, creating the Court of Private Land Claims, there is no such presumption (*Hayes* v. *United States,* 170 U. S. 637). Nor does any such presumption exist in any case not arising under a statute similar to that construed in the Peralta case. Such is the holding of this court in the case of *Mitchell* v. *Furman,* 180 U. S. 402, in which this court says:

"In the case at bar, as we have said, complainants were not proceeding under any act of Congress permitting the United States to be sued, but as at common law, and on the basis of absolute legal title. That title they were obliged to make out, and could only avail themselves of such presumptions as would ordinarily obtain. Without going into the question of the presumptions which might on occasion be indulged in, it is enough to say that it is clear that where the officer who assumed to convey the public domain had no authority *ex officio* to do so, such authority cannot be presumed from the mere fact of the conveyance in the absence of other evidence."

The Supreme Court of New Mexico having concluded that neither the Perea nor the Preston Beck was a valid grant under Mexican law, decided that the land here in question should be divided between them (transcript p. 74). In so doing the court followed the rule laid down in *Southern Pacific Ry. Co.* v. *United States,* 183 U. S. 519; *St. Paul & S. City Co.* v. *Winona Co.*

112 U. S. 720; *Chicago, etc., R. R.* v. *United States,* 159 U. S. 372; *Sioux City, etc. Co.* v. *United States,* 159 U. S. 349.

The fact that the Beck Grant was first surveyed does not make it superior to the Perea.

It is true that in *Stoneroad* v. *Stoneroad,* 158 U. S. 241, the Preston Beck Grant is referred to as "one which required action and approval on the part" of the United States, the necessary action including a servey. The same was doubtless true of the Perea Grant. The survey contemplated was to be made by the Interior Department of the United States. The claimants of these grants had nothing whatever to do with it. They could not direct it to be made, nor could they hasten or delay its progress. To hold, therefore, that the validity of the claim to the overlap in this case is to be determined by priority of survey, is to hold that the effect of the act of confirmation of Congress can be overridden or altered by the action of subordinate employees in the Interior Department over whose actions neither of the claimants to the land had any control. As said by the Supreme Court of New Mexico (transcript p. 77):

"The other point urged, and one which it is insisted we have overlooked in the opinion, is that the survey of the Beck grant was first made and that it operated as such a segregation of the land from the public domain as made any attempt to survey it under the Perea Grant futile and that the circumstance that the survey was first made of the Beck grant gave that an element of superiority. We are unable to accede to that view. We think the time when a survey would be made was so much a matter in the hands of the executive or ad-

ministrative officers that the mere fact that a contract may have been first let for the Beck grant, due perhaps to inherent difficulties in the survey of the other, or other purely accidental circumstances, could not operate to render nugatory an act of Congress which confirmed equally to the Perea grant and to the Beck grant the interests of the government in the lands involved."

There is nothing in the American proceedings nor in the doctrine of relation that gives the Beck Grant a superior title to the Perea Grant.

It is contended by appellant that the title to both the Beck and the Perea Grants, considering them as American titles, was initiated by the application to the Surveyor General for a confirmation under the act of Congress of 1854, and that the act of Congress confirming these titles relates back to the date of such application thus making the title to the Perea Grant superior to that of the Beck Grant since application for its approval was filed with the Surveyor General prior to the filing of such application on behalf of the Perea Grant.

In discussing this proposition it is necessary to keep in view two facts:

1st—Both the Beck and Perea Grants were not only imperfect, but were void Grants prior to the action taken by Congress with reference to them:

2nd—Both the Beck and Perea Grants were confirmed by Congress on the same day and by the same act.

The Preston Beck Grant was made December 6th, 1823 (transcript page 48) was filed before the Surveyor General of New Mexico, May 10th, 1855 (transcript page 51), favorably reported by the Surveyor General September 3toh, 1856 (transcript page 56.)

The Perea Grant was petitioned for December 20th,

1824 (transcript page 41), was made by the Political Chief and Territorial Deputation of New Mexico, March 3, 1825 (transcript page 42), was filed before the Surveyor General of New Mexico, May 15th 1857 and favorably reported by him September 15, 1857.

The Preston Beck Grant is Number One upon the report of the Surveyor General to Congress, and the Perea Grant is Grant Number Sixteen upon the said report; both Grants were confirmed by Congress by the Act of June 21st, 1860, 12 Stat at Large, page 71, which is in part as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, adn the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen be, and they are hereby, confirmed: *Provided*, That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed fo more than eleven square leagues to each of said claimants."

"Sec. 4. And be it further enacted, That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

Neither of the claimants of these grants had such a title to the grants of land claimed that he could by right, and, not as a mere matter of grace, have demanded that it be made perfect by the former government and that being so the Government of the United States without violating its treaty obligations to Mexico could have rejected both claims.

Neither of the claimants had title either legal or equitable to the land claimed, in fact they had no title of any kind whatever, perfect or imperfect, and but for the Act of Congress confirming the claims the lands embraced within the exterior boundaries of the grants would have remained as they were prior to congressional action, *public lands of the United States.*

The title to each of the grants had its inception in the Act of Congress of the United States, the titles are *American not* Mexican titles.

To apply the doctrine of relation to such titles with a view of determining their superiority is a misapplication of the doctrine, and has been expressly so ruled by the Supreme Court of the United States, in,

Dent v. *Emmeger,* 14 Wall. 308-12-13, where the court said:

"Titles which were perfect before the cession of the Territory to the United States, continued so afterwards and were in nowise affected by the change of sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. But inchoate rights such as those of Cerre were of imperfect obligation and affected only the conscience of the new sovereign. They were

not of such a nature (until that sovereign gave them a vitality and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by Congress they became American titles, and took their legal validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence. The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims or the circumstances attending it. Such is the settled course of adjudication both by this court and the Supreme Court of Missouri."

See also *Menard Heirs* vs. *Massey*, 8. How. 307
Choteau vs. *Eckhart*, 2 How. 345;
Les Bois vs. *Bramell*, 4 How. 449.

The case of *Dent* vs. *Emmeger*, supra, is conclusive authority to the point that the doctrine of relation cannot be adopted so as to refer the title or the Beck Grant to the date of the Mexican proceedings had thereon.

It is equally clear that the title of the Beck Grant cannot be referred back to the date when application was made therefor to the Surevyor General, and this for two reasons:

First. The Act of Congress confirming the Beck Grant provides specifically that the confirmation "shall not affect the adverse rights of any other person or persons whomsoever."

If the confirmation itself could not affect the adverse rights of the claimants of the Perea Grant, then certainly the application for the grant could not have that effect.

In *Rodriguez* vs. *United States*, 1 Wall. 482-88, the question was concerning a conflict among three different

grants, each of which had been confirmed by congress. In that case the court did not attempt to apply the doctrine of relation, but held that the Act of Congress of 1851, under which those grants had been confirmed, provided expressly "that neither the final decree of the Board of Commissioners or of the District or Supreme Court, or any patent to be issued under that Act, shall be conclusive against anyone but the claimant and the United States."

And in *Hale* vs. *Ackers,* 69 Cal. 160, the Supreme Court of California in applying the doctrine announced in *Rodriguez* vs. *United States,* supra, said:

"Under the Act of Congress of March 3, 1851, for the ascertainment and settlement of private land claims in California, the final decee of the Board of Land Commissioners or of the United States District or Supreme Court, confirming a Mexican Grant, or any patent issued therefor, is conclusive only between the United States and the claimant and does not affect the interest of third persons whose title accrued before the duty of the government and its right under the Treaty with Mexico attched."

In the act of Congress confirming the Preston Beck Grant we have the express declaration by Congress that the confirmation of that grant shall not affect the adverse right of any other persons or persons whomsoever.

We feel that we could rest the further discussion of this point upon this express provision by Congress. By that provision Congress limited the effect of its confirmation to the claimant of the Beck Grant. It did not attempt thereby to cut out any other title to the same land or to credit the superior title thereto in the claimants of the Beck Grant, but expressly preserved the adverse rights of any other parties claiming the same land. But without reference to the limiting effect of the provision

in the confirmatory act to the claimants of the Beck Grant, the doctrine of relation could not apply to this case.

A deed of grant operates by relation or inures to the benefit of another one where he who receives the deed or grant has led the other into an interest in the property and to avoid injury to that interest from events pending between the creation of that interest and the execution of the deed or the making of the grant.

In *Jackson* vs. *Baird,* 4th Johnson, 230 the court said:

"It is a general rule with respect to the doctrine of relation that it shall not do wrong to strangers. As between the same parties it may be adopted for the advancement of justice."

Washburn on real property, volume 3, page 328-329, lays down the rule as follows:

"But the case of *Frost* vs. *Beekman* further sustains the proposition that the courts will not apply the doctrine of relation when by so doing they will work injustice to the rights of innocent parties acquired between the events which it is proposed thus to unite by relation or by making that tortious which was lawful originally. Thus, through a deed made in pursuance of a previous contract to sell may as between the parties to the same relate back to the date of the contract it will not be allowed to do so to the injury of intermediate innocent purchasers or strangers who have acquired an interest. The doctrine as stated by Thompson, J., is: 'It is the general rule with respect to the doctrine of relation that it shall not do wrong to strangers. As between the same parties it may be adopted for the advancement of justice.'"

In a very early English case reported in Second Coke, it was held:

"And it was said that as relations shall extend only to the same thing and to one and the same intent, so they shall extend only between the same parties and shall never be strained to the prejudice of a third person who is not a party or privy of the same act."

And further on, in the same case, it was stated:

"Note, reader, not only in this case of relation which is a fiction of law, but also in all other fictions of law, they are to certain respects and purposes and extend only to certain persons * * * * * *. In all which cases, and other, the like, the law will never make any fiction but for necessity and in avoidance of a mischief."

Butler & Baker's case, 2 Coke's Reports, 29.

In *Gibson* vs. *Choteau,* 13 Wall. 101, the Supreme Court of the United States in considering the doctrine of relation, said:

"By the doctrine of relation is meant that principle by which an act done at one time is considered by the fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance *is held for certain purposes to take effect by relation as of the day on which the first proceeding was had.*. Thus in the present case the patent which was issued in 1862 is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the Act of Congress. At that time the title of the claimant to the land desired by him had its inception. * * * * * * The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice and is only applied for the

security and protection of persons who stand in some privity with the party that initiated the proceedings for the land *and acquired the equitable claim or right to the title.*"

Ii the case of *Lynch* vs. *Bernal,* 9 Wallace, 315-25, wherein the Supreme Court of the United States was considering the superiority of conflicting grants to the same tract of land, the title of each of which had been confirmed, the court in refusing to apply the doctrine, of relation, said:

"As by the doctrine of relation the decree confirming the title of the city took effect as of the day when her petition was presented to the Board, in July 1852, it is contended that the exception is to be construed as referring only to grants which had been confirmed previous to that date, or which might subsequently be confirmed in proceedings then pending. But the position is not tenable. Such a construction is not required from any application of the doctrine of relation. *That doctrine is applied only to subserve the ends of justice and to protect parties deriving their interests from the claimant pending the proceedings for the confirmation of his title.* It gives effect to the confirmation of the titles of the day when the proceedings to secure such confirmation were instituted, *and for that purpose only can the decree be treated as made at that time.* No different interpretation is to be given if the doctrine of relation had no application."

In *Evans* vs. *Durango Land and Coal Company,* 80 Federal 433-39, the court said:

"The doctrine of relation is a legal fiction which was invented and is applied solely for the protection of persons who without fault of their own would otherwise sustain an injury."

We assert with confidence that the Supreme Court of the United States has never, and in fact no other court has ever, applied the doctrine of relation in determining the question of superiority between two titles each of which descends from the United States. The Supreme Court of the United States, and other courts, have repeatedly considered cases wherein the dispute was between claimants to the same tract of land, both claiming title by patent or confirmation from the United States government, and in no one of these cases has this court ever attempted to apply the doctrine of relation, but has in every instance determined the superiority of the title by the application of principles of law entirely different from the doctrine of relation. A leading case upon that subject is the case of *Henshaw, et al.*, vs. *Bissell,* 18 Wall. 225. In that case an action of ejectment was prosecuted for the posession of certain real property in the state of Californa. Both parties claimed the premises under patents of the United States issued upon confirmations by Congress of grants made by the Mexican government.

It was attempted by counsel to have the doctrine of reltion applied for the purpose of determining the superiority of one of the claims, and the cases of *Beard* vs. *Federy,* 3 Wall. 479, and other such cases, were submitted as authority for their contention in that behalf. But the Supreme Counrt of the United States in refusing to follow those cases, said:

"There is nothing in the language of this court or of the Supreme Court of California in the several cases cited by counsel, which conflicts with this view. Those casese were all actions of ejectment in which imperfect or equitable claims or interests arising since the acquisition of the country, were set up against the legal title

held under patents, and the subjects there considered were the fact of the patent as a conveyance of the government and as evidence of the validity of the patentee's claim and its confirmation and survey as against parties having such imperfect or mere equitable claims or subsequently acquired interest| The patent treated merely as the deed of the government is held in those cases to have the operation of a quit-claim, or rather of a conveyance of such interest as the United States possesses in the land and to take effect by relation at the time when proceedings were instituted before the Board of Land Commissioners * * * * * * *But in this case both parties stand upon patents:* both have in these instruments the conveyance of the government and a recognition of their respective concessions under the former government. In a controversy founded upon either patent as against imperfect or equitable claims or interests obtained since the acquisition of the country the same language might be repeated which is used in the cases cited. But in the present controversy between parties claiming under two patents, each of which *reserves the rights of other parties* the inquiry must extend to the character of the original concessions. The controversy can only be settled by determining which of these two gave the better right to the demanded premises."

This case is direct authority for the proposition that the doctrine of relation cannot be applied in the case at bar. The court distinctly refused to apply the doctrine of relation in that case, although it was requested so to do.

The case of *Bissell* vs. *Henshaw*, supra, was decided by Judge Sawyer, sitting for the circuit court in the district of California. Judge Sawyer there held that the hostile claimant to a different grant is a "third person" within the meaning of the 15th section of the Act of 1851, and is not bound or concluded by the former

confirmation, survey or patent of the other grant, and on page 584 of the reported case Judge Sawyer said:

"In the case now under consideration, like Rodriguez's case, the junior grant, under which defendants claim, was first located and patented, and these acts were both accomplished before the passage of the act of 1880, so that the plaintiff who holds the prior grant was not and could not be in any way a party to the confirmation, location or patent, and in the language of the Supreme Court in Rodriguez's case he is not, therefore, bound or concluded by either the decree, survey or patent, as expressly enacted by the 15th section of the act of 1851."

Bissell vs. *Henshaw*, First Sawyer, 553-584.

In the case of *Berthold, et al.*, vs. *Macdonald, et al*, 24 Mo., 126, there was a contest between the claimants of two conflicting grants, both of which had been confirmed by the Act of Congress, March 3, 1807, upon successive days. It was insisted that one of these claims should prevail for the reason that it was the elder by relation. The Supreme Court of Missouri refused to follow this suggestion saying, at page 132,

"The claim of Jeannette was filed with the recorder before that of Gratiot, and was confirmed by the Board only the day after the confirmation made to him. Both confirmations were made under the second section of the act of 1807; and as by that section no tract was to be confirmed that was claimed by another we should regard the two confirmations as leaving the relative merits of the two titles as they stood before any confirmation. The law manifesting this care for the rights of third persons, there is no warrant for the inference that the mere circumstances of one claim being examined

and confirmed a day before the other should give it a conclusive preference. In providing that a tract claimed by another person should not be confirmed the law seems to have contemplated that the Commissioners should not decide on the relative merits of the two claims, but having confirmed both of them the question of superiority is left open for the courts."

The decision in this case was affirmed by the Supreme Court of the United States in *Bethold, et al.*, vs. *Macdonald, et al.*, 22 Howard, 334 which at page 347, reads:

"Each party here has a good title as against the United States; the Act of 1807 declaring that the confirmation of the Board shall be conclusive against the government. As both claims were filed in proper time, and the confirmations were had in due time, the equities are equal and balance each other so far as they depend on the confirmations alone; and the question is, can the ordinary courts of justice go behind the right established by the record confirming Gratiot's claim; to do this proof must be heard impeaching his prima facie title, and which proof existed when the claim was filed with the recorder and acted on by the Board. In other words, can the state courts go behind Gratiot's confirmation and on evidence compare his equity with that of Jeannette and adjudge who the true owner was. In the case of *Doe* vs. *Eslava*, 9 How, 421, this court came to the conclusion, that in a contention between double concessions, which balanced each other, proof could be heard, and must of necessity be heard, to determine the right between the contending parties."

The court then says:

"To conflicts of title of the foregoing description the principles asserted in the case of *Landes* vs. *Brant*, 10 Howard 370, apply. We have no doubt of the correctness of the decision of the Supreme Court of Missouri in this cause, and order its judgment to be affirmed."

In *Landes* vs. *Brant, supra,* the court determined the question of superiority, not between two confirmed grants, but between a confirmed grant and a claim which was merely inchoate and had not received the sanction of Congress. At page 370 the court said:

"The only question decided in *Choteau* vs. *Eckart,* 2 How. 345, and in *Les Bois* vs. *Brammell,* 4 How. 449, was that when Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one, nor could a court of justice go behind the first confirmation and ascertain from facts and title papers which claimant had the better original equity; that if this was allowed then the first confirmation could be overthrown by the courts and the action of the Political Department in all cases of double confirmation would have no conclusive force when the courts were resorted to."

It will be observed that when the Supreme Court in the case of *Berthold* vs. *Macdonald,* cited *Landes* vs. *Brant,* page 370 as an authority for its decision, that it in fact cited the cases of *Choteau* vs. *Eckert,* 2 Howard 345, and *Les Bois* vs. *Brammell,* 4 Howard 449, as those are the two cases referred to at page 370, in *Landes* vs. *Brant.*

In *Les Bois* vs. *Brammell,* 4 Howard 449, the Supreme Court of the United States considered two overlapping grants, each of which had been confirmed by congress, and held that the confirmatory act passed by Congress in 1836 did not reach back to the original concession and exclude grants to the same land made in intermediate time either by Congress itself or a Board of Commissioners, or the District Court acting under its authority.

The case of *Doe* vs. *Eslava*, 9 Howard 421, is to the same effect.

The case of *Barry* vs. *Gamble*, 3 Howard 32, was a contest between the claimant of land located under a "New Madrid" certificate and a Spanish land grant. Both parties claimed under the United States; one under an act confirming the land grant; the other under a location of a "New Madrid" certificate, made pursuant to an Act of Congress. The court held that inasmuch as the land certificate had been located prior to the confirmation of the grant by Congress, that the holder of the land located under the New Madrid certificate took the land, the court saying: "Lafleur was a claimant with a good title in equity when the act of 1824 was passed. This he well might perfect into a patent as his equity was expressly protected by the act of 1821 and by implication in that of 1824, neither the patent or entry was affected by the proceedings had onMcKay's claim in the District Court of Missouri and in this court, nor by his patent issued pursuant thereto: It follows Lafleur's is the better title and that the decision of the Supreme Court of Missouri be affirmed."

Lanfear vs. *Hunley*, 4 Wallace 204 was a case of a contest between a claimant of land under an Act of Congress confirming a Spanish land grant to him and one claiming by right of preemption under the laws of the United States. The Supreme Court in rendering its decision held that the act of confirmation by Congress did not affect the rights of the holder under the preemption laws, the pre-emptor being an adverse claimant and not affected by the Act of Congress. The court, at page 208, saying:

"The act, considered in its entirety, confirmed to the plaintiff whatever he was entitled to by vitue of the original grant, conceding that to have been valid. It neither enlarges nor diminishes what the grant gave him. It extinguishes all claim on the part of the United States to the land covered by the surveys, but as regards all adverse claimants, it determines nothing and concludes no one."

In the case of *Doe* vs. *Eslava*, 9 Howard 421-446, this Court considered the question of superiority between two grants, both confirmed at the same time by Act of Congress, the one a Spanish, the other a French, concession. At page 446 the court said:

"The title of the plaintiff so far as connected with the United States, consisted of a confirmation of the French Grant and a quit-claim patent. The title of the defendant thus connected consisted of a consummation of a supposed Spanish concession and a certificate of this fact entitling him to a patent if he wished. Both were confirmed at the same time by Congress. The former then is no better as to title than the latter. A patent, like the subsequent one in this case merely quit-claiming or releasing any of the right of the United States, gives no title to the patentee superior to what a confirmation had given."

The case of *McCabe* vs. *Worthington*, 16 Howard 86, was a contest between the claimant under a Spanish land claim in Missouri and a person who claimed the same land by reason of a sale made to him of State lands by the State of Missouri. It appears that the claimant to the Spanish land grant filed its claim in the District Court in August, 1824, and demanded a confirmation. This was refused and the petition dismissed in 1825. An appeal was prosecuted from the decree to the Supreme Court of the United States, and in 1836

a decree was rendered by that court confirming the claim. The adverse party relied on patents from the United States issued in the year 1836, founded or entries made in the year 1834. In deciding this case the Supreme Court of the United States, at page 96, predicated its decision upon the following observation

"And the question here is, whether the decree of the Supreme Court related back to the date of filing the petition against the United States in the District Court. If it did then the plaintiff is entitled to recover, and if it did not then the judgment below must be affrmed."

The court then proceeds to consider the various acts of Congress under which each of the parties claim. Then says, at page 97:

"But another construction is conclusive of this case: The Act of May 24, 1828, Section 2, provides that confirmations had by virtue of the Act of 1824, and patents issued thereon, should only operate as relinquishments on the part of the United States, and should in nowise affect the right and title, either in law or equity, of adverse claimants to the same land. The act spoke of confirmations by decree and declared that the decree should operate prospectively, and consequently embraced a case where the land was acquired by purchase from the United States before the decree was made, unless the Acts of 1811 and 1818 protected the land from sale. For these reasons we agree with the Supreme Court of Missouri that the defendant has the older and better title, and order the judgment to be affirmed."

The case of *McCabe* vs. *Worthington*, supra, was followed by the Supreme Court of the United States in *Trenier* vs. *Stewart*, 101 U. S. 797, at page 808, saying:

"Two propositions arising out of the fact in the case cannot well be controverted. First, that if both titles defend exclusively for their validity upon the action of Congress the defendants' must prevail. The rule being that he who first obtains the title, *and not he who first applied for it, has the better right.*"

Under the authorities cited the doctrine of relation cannot be applied to the case at bar to give superiority to the Beck over the Perea Grant, for two reasons:

First. The Act of Congress confirming the Beck Grant expressly provided that the confirmation should not affect the rights of third persons holding adversely to the claimant of the Beck Grant, and the confirmation of that grant was only conclusive against the United States, and did not conclude any other persons.

Second, The doctrine of relation is never applied in cases wherein both parties claim through title each deraigned from the United States. The doctrine only opeates for the purpose of promoting justice and when it is absolutely necessary to invoke it for the purpose of preventing injustice being done the holder of an interest in the property who was lead into that interest by the owner of the title. The doctrine is never invoked to affect third parties.

Respectfully Submitted,
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